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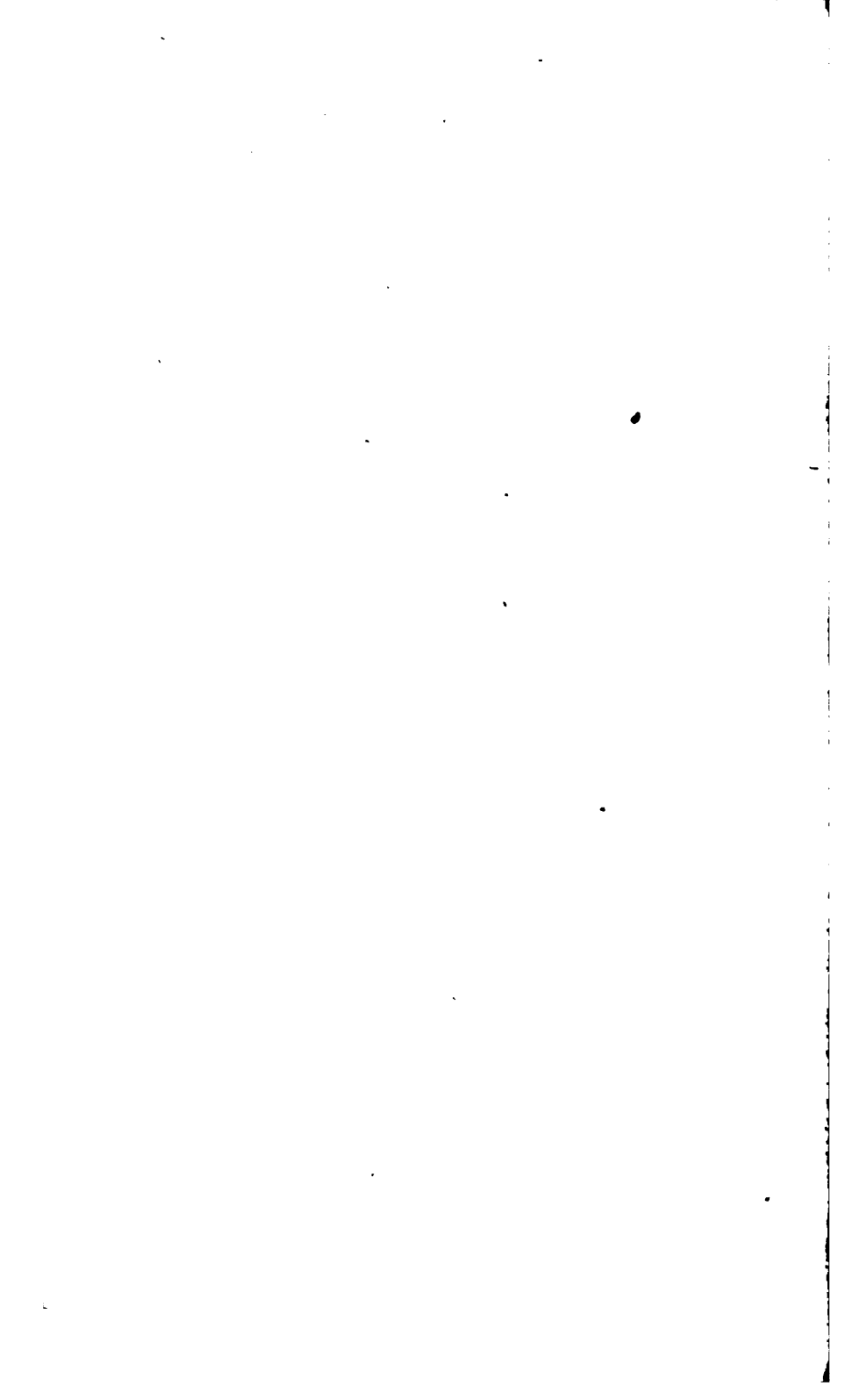












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AND THE IMPORTANT DECISIONS OF THE

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AND HIGHER COURTS OF OTHER STATES.*

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ISAAC E. DAVIS ET AL., APPELLANTS,

VS.

THE SPRING VALLEY WATER WORKS COMPANY
ET AL., RESPONDENTS.

"ACTUAL POSSESSION" REQUIRED BY THE "VAN NESS ORDINANCE." The putting of a fence, consisting of posts and two boards nailed on them horizontally, on three sides of a tract of forty acres of land in San Francisco, leaving the fourth side open and without any natural barriers to keep cattle in, and the turning of a pair of oxen on the land on several occasions for a few days at a time, did not constitute an "actual possession" within the meaning of the Van Ness Ordinance.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

G. F. & W. H. Shurp, for appellants.

Sharp & Lloyd, and *Campbell*; *Fox & Campbell*, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

This is an action of ejectment to recover a certain tract of land situate in the City and County of San Francisco, and containing about forty acres. The case was tried by the Court, judgment passed for defendant, and plaintiff moved for a new trial, which was denied by the Court. The appeal is from the order of the Court denying plaintiff's motion for a new trial.

The following were some of the findings of the Court:

"That in 1853 Otis, the grantor of the plaintiffs, erected two fences, which ran easterly across and beyond the Presidio road upon the same lines with the northern and southern fences of the Bird's Nest, lying west of the road to the east-

ward; these two fences were united by a third fence which ran north and south; that these three fences, with a picket fence which ran along the west side of the road, constituted an inclosure. That these fences were built of posts and two boards of irregular widths, placed horizontally from post to post. That this inclosure remained intact but a day or two, when the northern and southern lines were broken down where they crossed the Presidio road; that within a few days said Otis erected another fence of the same character along the western side of the road, which, with those already described, constituted an inclosure.

"That this inclosure continued in good order until the summer of 1855.

"That the tract to the east of the road was never applied to any use by said Otis, his successors, or the plaintiffs, or any of their grantors, except that in 1854, on two or three occasions, a pair of work-oxen were turned into the lot for a few days at a time, and that the said last-mentioned tract, on the east side of the road, are the premises in controversy in this suit. That said premises are situated in the City and County of San Francisco, and within the provisions of the Act of the Legislature of the State of California, approved March 11, 1858, entitled 'An Act concerning the City of San Francisco' and to ratify and conform certain ordinances of the Common Council of said city, and under the provisions of the orders and ordinances therein recited and referred to.

"That the plaintiff, Davis, in 1860, erected a good and substantial fence along the northern and southern lines of the larger tract, commencing on the east side of the road and on the eastern side of the premises in controversy, which continued for two years and until the entry of defendants; that he did not build any fence along the eastern side of the road, but the tract was left open on the western side and did not inclose the premises in controversy.

"That the acts aforesaid did not constitute an actual possession of the premises in controversy, or a possession of the same as required under the Van Ness ordinance.

"That the plaintiffs have no title to the premises hereinafter described, or any part thereto.

"That there never was any other acts of possession by or on the part of the plaintiffs, their grantors, or any of them, in or upon the premises in the answer herein mentioned, or any part thereof."

It is claimed, on behalf of the appellant, that a possession of the premises in controversy was shown in him, and those under whom he claimed, which was sufficient under the Van

Ness ordinance. It is not pretended, however, that there was any fence along the west line of the tract. All that plaintiff claims is that a larger tract was at one time fenced, and subsequently the Presidio road was extended across this larger tract, and a fence was thereupon built along the west line of the road forming a complete inclosure of that portion of tract lying west of the road, but leaving the west line of that portion of the land situate on the east side of the road inclosed on only three sides. There was no fence along the west line. This fact is shown by the diagram exhibited to the Court by both sides during the argument.

Speaking of the character of possession required under the Van Ness ordinance, the Court says: "By actual possession, as the terms are here used, is meant that possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. An inclosure, by an ordinary fence, of the premises without residence thereon, or improvement or cultivation, or other acts of ownership, is of itself insufficient. An inclosure of this character is by itself only the declaration of an intention to appropriate and possess the premises; it does not, unaccompanied with any other acts, constitute the actual possession which the ordinance contemplates." (*Wolf vs. Baldwin*, 19 Cal. 313. See also *Bovel vs. Rollins et al.*, 30 Cal. 408; *Brumagim vs. Bradshaw*, 39 Cal. 24; *Walsh vs. Hill*, 41 Cal. 582).

It is claimed that the land on the east side of the Presidio road was protected along its west line by natural barriers, which, together with the fences on the other three sides of the tract, constituted a complete inclosure. But the evidence does not show that there are any such natural barriers. Indeed, the evidence of the plaintiff himself is adverse to such a conclusion. He says "the land east of the road would not form a natural barrier to keep cattle in without a fence."

In view of the findings of the Court and the evidence in the case, we are of opinion that no such possession was shown in the plaintiff or his grantors as was required under the Van Ness ordinance, and we find nothing in the case to justify us in disturbing the order of the Court below.

Order affirmed.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed January 17, 1881.]

No. 10,546.

THE PEOPLE, RESPONDENT,

VS.

LUIS RAMIREZ, APPELLANT.

CRIMINAL LAW—ONE WITNESS MAY BE INTERPRETER FOR OTHER WITNESSES BEFORE GRAND JURY. There is nothing to prevent a person who made the arrest, and who also appeared as a witness against a prisoner, from acting as interpreter in the examination of other witnesses before the grand jury, and being therefore present at the examination of such other witnesses before the grand jury.

ORDER DENYING MOTION TO SET ASIDE INDICTMENT NOT REVIEWABLE ON CERTAIN APPEALS. An order denying a motion to set aside an indictment on the ground that the officer who made the arrest, and was also a witness against the prisoner, acted as interpreter for other witnesses before the grand jury, is not reviewable on appeal by bill of exceptions or on motion for new trial, or on motion for arrest of judgment.

CONFESSIONS MADE TO OFFICER AFTER BEING SUPPLIED BY HIM WITH DRINK AT PRISONER'S REQUEST. Where a prisoner arrested for murder, while being transported by the arresting officer from one place to another, called for a number of drinks of whisky, and after being supplied, and feeling lively and talkative, confessed to the officer that he had killed the deceased: *Held*, that for anything that appeared, such confession was voluntary, uninfluenced by any inducement, promise, threat or menace; and that there was no abuse of discretion in admitting it in evidence against the accused.

INSTRUCTIONS MUST BE PREDICATED ON THE EVIDENCE IN THE CASE. It is no error to refuse an instruction which is not predicated upon the evidence in the case.

CHARGE TO JURY—IF LAW CORRECTLY GIVEN, NO ERROR IN REFUSING TO GIVE THE REASONS OF THE LAW. Where the Court in a criminal case gave a correct charge, setting forth the principles of law involved, but defendant asked an instruction on the same subject setting forth *in extenso* the reasons of those principles: *Held*, that it was sufficient for the Court to give correctly the principles of law applicable to the case, without the grounds or reasons of them, and that there was no error in refusing the instruction.

CHARGE TO JURY IN HOMICIDE—ALLOWABLE USE OF PHRASE "WHERE DECEASED WAS SLAIN." Where, in a murder case, the Court in charging the jury as to the effect as evidence of flight or concealment by the accused, said that if defendant "soon after the time deceased was killed, if killed at all, concealed himself, or fled from the neighborhood where deceased was slain," and objection was made to the use of the words "deceased was slain" as an assumption of the *corpus delicti*: *Held*, that the language did not assume the fact that deceased had been killed, but left it as a substantial fact for the jury to find.

AN INSTRUCTION ONCE GIVEN NEED NOT BE REPEATED AT REQUEST OF COUNSEL. When a legal principle has been once announced by a Court in its charge to a jury, there is no necessity for its repetition; and there is no error in refusing to give it a second time in the form of an instruction asked by defendant.

OMISSION TO MARK INSTRUCTIONS REFUSED AS "REFUSED." The omission of a Court to mark instructions refused, which are so refused, because given already, if an error, is an immaterial one which could not prejudice defendant.

IMPEACHMENT OF WITNESS—IMPROPER QUESTION ASKED AND ANSWERED WITHOUT OBJECTION. Where on an attempted impeachment of a witness for the prosecution in a criminal case, the District Attorney asked: "From what you know of him, would you believe him under oath?" Held, that though the question was improper, yet as it was asked and answered without objection, there was no error that could be availed of.

Appeal from the Superior Court of San Bernardino County.

H. W. Willis, for appellant.

A. L. Hart, Attorney-General, for respondent.

McKEE, J., delivered the opinion of the Court:

The defendant was indicted for murder. On his arraignment, his counsel made a motion to set aside the indictment upon the ground that one Celis, who was a Deputy Sheriff, and had arrested the defendant, and was also a witness against him, had acted as interpreter in the examination of witnesses against him before the grand jury, and was present at the examination of such witnesses by the grand jury. The motion was denied, and the ruling is assigned as error.

1. The presence of the interpreter before the grand jury was necessary, and the law allowed it. (Stats. 1872-2, 540.) But it is contended that one who was the prosecuting witness against the defendant, could not legally act as interpreter against him. We know of no reason why a person who is a witness in a case should be disqualified from acting as interpreter at the examination of other witnesses in the case. It must be presumed that the grand jury or District Attorney, in acting under the statute, summoned a fit and proper person as interpreter. The fact that the person summoned was a witness in the case, or had arrested the defendant, was immaterial. Doubtless there were extrinsic reasons which influenced the grand jury in summoning the particular interpreter. It may have been that he was the only one whose services were available, and that but for him it would have been necessary to postpone the examination of witnesses to their inconvenience, the public detriment, and the delay of justice. At all events, the selection of an interpreter depends so much upon circumstances, including the necessities of the case in which the services of one may be required, and of which those who require them are most competent to judge, that a Court should not interfere with the action of those who make the selection, unless it appears there has been a gross abuse of discretion, or that injustice

has been done to the defendant. No such showing was made on the motion, and the motion was properly denied. Besides, the order denying the motion is not reviewable on appeal by bill of exceptions (Sections 1170, 1172 and 1173, Penal Code), or on motion for a new trial (Section 1004, Id.), or on motion for arrest of judgment. (Section 1185, Id.; *People vs. Colby*, 4 Pacific Coast Law Journal, 333.)

2. The next assignment of error is, that the Court improperly admitted in evidence a confession made by the defendant, and in its charge to the jury gave an instruction in relation to it, which, it is claimed, was erroneous, and refused to give instructions upon the same subject which were requested by the counsel of defendant.

The confession of the defendant was made to the witness Celis, while the latter had the defendant in custody. Celis was Deputy Sheriff of Los Angeles County, and arrested the defendant without a warrant in Kern County. On his way from that county to Los Angeles with the prisoner he stopped, about 4 o'clock in the morning, at Newhall, in Los Angeles County. There the prisoner asked for a drink, and some whisky was brought him. He drank about half a tumbler full, and between that and breakfast he had two more drinks, each of about the same quantity. After breakfast the officer and the defendant went on horseback to San Fernando, where they arrived between 8 and 9 A. M., and the defendant had two more drinks of whisky. At San Fernando the officer obtained a horse and buggy and drove with the defendant to Los Angeles, where they arrived at 11 o'clock A. M. On the way, the defendant, "feeling pretty lively and talkative," confessed to the officer that he had killed the deceased. This confession was not influenced by anything said to him by the officer. So far as appears by the record, the officer had not spoken to him at all upon the subject. After the confession had been made, the defendant remarked: "All I am afraid of is, when we get to Los Angeles I will be mobbed and hung." And the officer said to him: "They won't do anything of the kind." The defendant then asked the officer: "What did people say since I have been gone?" And the officer answered: "They blame you that you went next day and finished him." To which the defendant replied: "I did not. Let them prove it. I killed him because he was a son of a —."

We think it evident that the confession was the spontaneous suggestion of the defendant's own mind, unmoved and uninfluenced by any inducement, promise, threat, or menace by the officer to obtain it, and there was no abuse of discre-

tion in admitting it as evidence. (*People vs. Jones*, 31 Cal. 565.) Nor ought the confession to have been excluded because it was made while the defendant was in custody, whether his arrest had been made with or without a warrant. (1 Greenleaf Ev., Sec. 229.)

3. In its charge to the jury the Court instructed them upon the subject of voluntary confessions as follows: "A man's declaration of voluntary confession is always admitted in evidence against him when not made under the influence of threats, intimidations, promises or inducements, for the law presumes that a man will not say anything untrue against himself or his own interests. But the evidence of the oral admissions of a party ought to be viewed with caution." This is a correct exposition of the law. But defendant's counsel requested two additional instructions upon the same subject. One to the effect that the jury were to receive voluntary confessions with great caution and distrust, if they found from the evidence that the defendant was so much under the influence of liquor as to be unconscious of what he was saying, or careless in his expressions, or did not mean to utter the language imputed to him, or did not utter the exact words testified by the officer. The other reiterated the principle of law which had been substantially given by the Court; but it set forth *in extenso* the reasons for the rule excerpted from 1 Greenleaf on Ev., Sec. 214. We think the Court did not err in refusing the first, because it was not predicated upon the evidence in the case (*People vs. Strong*, 30 Cal. 151), and because it embraced too much. Nor did it err in refusing the second, because, while it is true that principles of law should be stated to a jury in clear and explicit terms, yet, where they are so stated, it is not necessary, nor is a Court bound to give the grounds and first original causes from whence they have sprung. It is sufficient that the Court correctly gives to the jury the law applicable to the facts of the case. "A judge," says the Supreme Court of Pennsylvania, "is bound to instruct the jury on the law itself, and not on its history, object or purpose. He does his duty by saying what the law is, without an exposition of its reasons." (*Lincoln vs. Wright*, 23 Penn. St. 76.)

4. It is next urged that the Court erred in giving to the jury the following instruction: "Flight or concealment is relevant testimony for the prosecution, and it comes in with other incidents, the death of deceased being proved, from which guilt may be cumulatively inferred; and if you find from the testimony in this case that the defendant soon after the time deceased was killed, if killed at all, concealed

himself or fled from the neighborhood where deceased was slain, then that circumstance may be considered by you with the other testimony in the case as bearing upon the question of defendant's guilt." The principal ~~instruction~~ urged against the instruction is the use of the phrase, "deceased was slain," because it is said to be an assumption of the *corpus delicti*. In *People vs. Williams*, 17 Cal. 142, the use of the word "victim," as applicable to the deceased, was considered to be improper, because it seemed to assume that the deceased was wrongfully killed; and because it was nearly equivalent to an expression characterizing the defendant as a criminal. It was, therefore, held that a Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such impressions." But in using the word "slain," the Court below did not assume that the deceased had been killed. It left that fact, as the substantial fact in the case, for the jury to find; nor could the word, as employed by the Court in its charge, have left an impression upon the minds of the jurors that the crime for which the defendant was on trial had been actually perpetrated; for the jury were told that if they found the deceased was killed and that the defendant concealed himself, or fled from the neighborhood where the deceased was slain, it was a circumstance for their consideration in connection with the other testimony in the case. This was fully in accord with the doctrine as announced in *People vs. Stanley*, 47 Cal. 118.

5. There was no error in the instructions given to the jury upon the subject of circumstantial evidence. The principles announced in them are fully sustained by *People vs. Strong*, 30 Cal. 151; *People vs. Cronin*, 34 Id. 191; *People vs. Bonney*, 19 Id. 431; *People vs. Dick*, 32 Id. 213; *People vs. Murray*, 41 Id. 66.

6. Another objection is, that the Court refused to give certain instructions which were requested by defendant's counsel upon the question of reasonable doubt. Counsel admit that "these instructions are essentially embraced in the charge of the Court, but are abruptly refused without the assignment of such reason." When a legal principle has been once announced there can be no necessity for its repetition, and there can be no error in refusing to give it in a second instruction. A Court is not bound to repeat itself in its charge, at the request of counsel. (*People vs. Hobson*, 17 Cal. 424; *People vs. Kelly*, 28 Id. 423; *People vs. Strong*, 30 Id. 151; *People vs. Williams*, 32 Id. 280.) The omission to mark instructions refused, because they had been given

already, if an error is an immaterial one, which could not prejudice the defendant. For mere abstract and immaterial errors, Courts will not reverse a judgment. (*People vs. Ybarra*, 17 Cal. 166.)

7. The last objection urged is, that the District Attorney, in the course of the examination of a witness, introduced to sustain the character of Celis, whose reputation had been attacked, asked the witness this question: "From what you know of him would you believe him under oath?" In *People vs. Methvin*, 53 Cal. 68, a similar question was held to be improper; but in this case the question was asked and answered without objection.

There is no error in the record which operated to the prejudice of the defendant, and the judgment and order denying the motion for a new trial are affirmed.

We concur: McKinsty, J., Ross, J.

IN BANK.

[Filed January 21, 1881.]

No. 6300.

A. G. LADDA, RESPONDENT,

vs.

C. B. HAWLEY, APPELLANT.

CONTRACT FOR CUTTING TIMBER ON PUBLIC LAND VOID. The cutting of timber upon public land of the United States being an illegal act, any contract for the cutting of such timber, or growing immediately out of or connected with such illegal act, is void.

RIGHTS OF PRE-EMPTION SETTLER ON PUBLIC LAND CONFINED TO BONA FIDE PURPOSES OF SETTLEMENT. A pre-emptioner upon public land of the United States may settle upon, occupy and use it for the purpose of settlement, and has the right of course of clearing away timber for the purposes of cultivation and occupation; but until he perfects his title the land remains public land, and he can use it only in such manner as the Government authorizes.

QUESTION OF OWNERSHIP OF TIMBER CUT ON PUBLIC LAND. Where a pre-emption settler on public land, prior to the perfection of his title, made a contract to have the timber on it cut for milling purposes, and after the timber was cut commenced an action to recover its value, and subsequently perfected his title: *Held*, that when he acquired title to the land, the title to the timber previously cut for illegal purposes did not pass, and that therefore he could not recover.

Appeal from the District Court of the Fourteenth Judicial District, Nevada County.

Johnson & Cross, for appellant.

Hupp & Walling, for respondents.

MYRICK, J., delivered the opinion of the Court:

Plaintiff in his complaint alleged that defendant was indebted to him in a balance of \$432.25, and interest, for 73,802 feet of pine timber, sold and delivered by plaintiff to defendant, at \$1.25 per thousand.

Defendant, in his answer denied the indebtedness, and averred that the only transaction the parties ever had concerning timber was that plaintiff represented to defendant that he (plaintiff) was the owner of certain lands, and desired to sell to defendant the timber growing thereon; that relying upon such representations, and believing them to be true, defendant agreed to pay the above price for so much of said timber as he should cut down and use; that after he had cut down and used the timber, and paid plaintiff in part therefor, he ascertained that plaintiff was not the owner of the timber, but that the same was, when so cut and removed, timber belonging to the public domain of the United States, which plaintiff had no right to sell, and that plaintiff is liable in both civil and criminal actions. Defendant averred that plaintiff ought not to have or maintain his action for the reason that the contract is void, the only consideration being the granting to defendant by plaintiff of the right to cut timber from the public land of the United States, which cutting is prohibited by the laws of the United States.

On the trial plaintiff gave in evidence an agreement signed by himself, dated May 11, 1876, expressing that he thereby sold and conveyed to defendant "all the pine timber growing on his ranch in Nevada County," covering 160 acres, for the consideration therein expressed, viz., \$100 then paid, the balance to be paid at the rate above specified; "said timber to be considered as usually cut for milling purposes." The agreement gives to defendant the use of all springs of water, and right of way for roads, mill sites, etc., necessary for the cutting and manufacture of said timber. The plaintiff testified that he filed a pre-emption claim upon the quarter section of land from which the timber was cut in May, 1874, in the Sacramento United States Land Office, and that the application was sustained; that since the commencement of this suit he had paid to the United States Land Office the Government price of the land; that at the time said contract was made plaintiff had a portion of the quarter section under fence. Another witness testified to the quantity of timber cut.

Thereupon defendant moved the Court for a nonsuit, on the ground that the action is brought upon a void contract, it appearing from plaintiff's evidence that he filed a pre-emption claim on the land in 1874, and paid for it after March 22,

1878, thereby showing that the same was public land at the time the contract was made and the timber cut. The Court denied the motion, and the defendant excepted.

The trial thereupon proceeded, findings of fact were filed, and judgment went for plaintiff. Defendant moved for a new trial, which was denied, and defendant appealed from the judgment and from the orders denying his motions for non-suit and for a new trial. From the view we take of the case, it is necessary to consider only the ruling on the motion for non-suit.

By the Act of Congress of March 2, 1831, Section 2461 Revised Statutes United States, it is a penal offence to cut timber upon any of the public lands of the United States, "with intent to export, dispose of, use or employ the same in any manner whatsoever, other than for the use of the navy of the United States," and the offense is punishable by fine and imprisonment. It is a well settled principle of law that if a contract grow immediately out of, or is connected with an illegal act, Courts will not enforce it, but will allow the objection to be made by either party (2 Kent, 466-7); and unless some act, express or implied, upon the part of the Government, gave permission for or justified the cutting of the timber which is the foundation of this action, such cutting was illegal and the contract relating thereto is void.

Conceding that plaintiff was a pre-emptioner, he had all the rights for the enjoyment of which the Government permits pre-emption. Those rights are to occupy, settle upon and use the land for the purpose of settlement, which would, of course, include the right of clearing away the timber for the purpose of cultivation or occupation. Until he shall perfect his title by purchase, the land remains public land, and he may use only in such manner as the Government authorizes.

In *United States vs. McEntee* (23 Int. Rev. Rec. 368), the defendant was sued to recover the value of timber cut by him on the public lands. He justified the cutting upon the ground that he occupied the premises under the Homestead Act of 1862. The Court instructed the jury that "everything necessary for the cultivation of the land, and manifesting an intention to make permanent occupancy and *bona fide* settlement, is legitimate and proper to be done. The land can be cleared and the timber sold, if cut down for the purpose of cultivation; but if sale and traffic is the only reason for severing the timber, and it is not done with a view of improving the land, the intentions of the law-giver are subverted." The verdict was for the United States.

In *United States vs. Nelson*, 5 Sawyer, 68, the defendant

had located seventy acres of the public lands under the mining law (Section 2319, Rev. Stat. U. S.), and had occupied it for several years as a mining claim. The Court said: "It is admitted that the defendant has a right to cut down or destroy the trees so fast as the earth in which they stand is dug or washed away in the process of mining, and it may also be admitted that such timber may be used or disposed of by the locator in any way that is most profitable to himself rather than to let it remain on the ground to decay; but whether the cutting of the timber is merely incidental to a *bona fide* mining operation, or the mining operation is a mere pretext for appropriating and disposing of the timber, is a question of fact to be determined in each case by its own circumstances." Judgment was for plaintiff.

In the case before us, the land being at the time the contract was made and the timber was cut public land of the United States, it was incumbent upon the plaintiff to show either that the timber was cut for the use of the navy of the United States or that it was cut for the purpose of enabling him to occupy or cultivate the land, which would of course justify the cutting of timber for the necessary building and fencing of the land. There is no evidence at all in either of those directions. On the contrary, the paper signed by plaintiff gave to defendant the right of way for roads and mill sites, and the timber was "to be considered as usually cut for milling purposes," which would seem to indicate that commercial purposes were the paramount if not the only purposes in view.

The plaintiff is not aided by the fact that the defendant appropriated the timber or any portion of it to his own use, and has not offered to return it. The cases cited by him relate to instances of sales of personal property under contracts void at the time, but subsequently ratified, the vendors having been the owners of the property. In this case the plaintiff, at the time the contract was made and the timber was cut, did not own the property.

Neither is the plaintiff aided by the fact that after the commencement of the suit he paid the government for the land. He then became the owner of the land as it then was, with the timber cut. Title to timber previously cut for illegal purposes did not pass.

Judgment and orders reversed, and cause remanded with instructions to render judgment of nonsuit.

We concur: Morrison, C. J., Ross, J., McKee, J.

We dissent: Sharpstein, J., Thornton, J.

IN BANK.

[Filed January 18, 1881.]

No. 10,573.

THE PEOPLE, RESPONDENT,
VS.AH LUCK, ON GUE, AH SING, AH HOY AND AH
LOON, APPELLANTS.

CRIMINAL LAW—MURDER—FATAL WOUNDS, BUT UNCERTAINTY AS TO IMMEDIATE CAUSE OF DEATH. Where certain chinamen were convicted of murder in the first degree of a fellow countryman, and the evidence showed that he had been shot and cut upon a bridge, and then thrown in a river, and it appeared that the wounds would necessarily have produced death, but the witnesses could not tell whether death was in fact produced by those wounds or by drowning: *Held*, that the evidence was sufficient to justify the verdict.

HOMICIDE—USE OF WORDS "MEDIATE CAUSE OF DEATH" IN CHARGE TO JURY. Where in a murder case it appeared that the deceased had received from the defendants mortal wounds on a bridge, and was then thrown in the river below, and the Court instructed the jury that if from the evidence the jury found that the mediate cause of death was the wounds, then the fact of being thrown in the water after the infliction of such wounds was of no consequence: *Held*, that though there might be some criticism as to the use of the word "mediate," there was evidence tending to show that death resulted from the wounds, and that the case was properly submitted to the jury.

Appeal from the Superior Court of Nevada County.

George S. Hupp and *H. V. Reardon*, for appellants,
A. L. Hart, Attorney-General for respondent.

MYRICK, J., delivered the opinion of the Court:

The defendants were indicted for the murder of one Ah Gow; and the defendants Ah Luck, On Gue and Ah Sing were convicted of murder in the first degree, the punishment of the first being death, and of the others of imprisonment for life.

1. The defendants allege that the evidence was not sufficient to justify the verdict in that the evidence does not show that death resulted from wounds inflicted by the defendants, but might have been from drowning. The circumstances were that deceased was shot, and was cut by some sharp instrument, upon a bridge crossing the Truckee River, at Truckee, and the body, alive or dead, thrown into the river. Dr. Curless, a physician called for the prosecution, testified that certain of the wounds found by him upon the body of Ah Gow would necessarily produce death; but whether Ah Gow was dead when he was thrown into the river, or that his death was not caused by drowning, he could not state,

for the reason that in the *post mortem* examination made by him he did not open the body, and therefore could not have examined the heart and lungs, which was necessary to do in order to ascertain with any degree of certainty whether death did or did not result from drowning.

2. It also is urged that the Court erred in giving the following instruction, viz.: "If from the evidence the jury find that the mediate cause of the death of Ah Gow was the wounds inflicted upon him by the defendants, then the fact that he was thrown into the water after the infliction of such wounds is of no consequence;" it being claimed to conflict with and nullify other instructions given, in substance, as follows: If the jury believe that cuts were inflicted upon deceased by defendants and he was then thrown into the river where he was found dead, and are yet in doubt as to whether the death was caused by the wounds or by injuries received in the fall from the bridge, or by drowning, they should find a verdict of not guilty; that to convict they must be satisfied beyond all doubt that the deceased came to his death by wounds and injuries inflicted upon him by the defendants before he was thrown into the river; that if the wounds inflicted while on the bridge were mortal, they must still be satisfied beyond all doubt that his death was not caused either by drowning or by the fall from the bridge, and unless they are so satisfied they should find a verdict of not guilty; that in order to convict the defendants the jury must be as well satisfied that the deceased did not come to his death by the fall or by drowning as they are that he was found dead.

There was evidence tending to show that the deceased came to his death from the wounds inflicted by the defendants, and that evidence was plainly submitted to the jury under instructions as favorable to the defendants as they had the right to ask—perhaps more favorable. There was no substantial conflict in the instructions to the prejudice of defendants, whatever criticism may arise from the use of the word "mediate." It is true, as urged by counsel, that people cannot conjecture as to the mode of death, on the trial of a capital case; but we apprehend from the testimony in this case that the jury were not practically called upon to rely upon conjecture or indulge in fanciful suppositions as to the cause of the death of the deceased. We think the evidence fully justified the jury in finding the defendants guilty as charged.

Judgments and orders affirmed.

We concur: Sharpstein, J., Ross, J., McKinsty, J.

DEPARTMENT No. 1.

[Filed January 21, 1881.]

No. 7118.

A. TOWNSEND, RESPONDENT,

VS.

H. C. COPELAND ET AL., APPELLANTS.

CERTIORARI NOT THE PROPER PROCEEDING TO REMEDY IMPROPER ACTION OF SUPERVISORS IN AWARDED CONTRACTS. When the Board of Supervisors, after calling for sealed proposals to do county printing, had two bids, one of which for five cents it rejected as no bid, and the other for \$250, it accepted and awarded a contract; and on certiorari the Superior Court ordered the award of the contract as made to be set aside, and that the Board should award the contract to the other bidder: *Held*, that the portion of the judgment on certiorari ordering the contract to be awarded on the rejected bid could not be sustained, and that in respect to the case in general certiorari was not the proper remedy.

Appeal from the Superior Court of Tehama County.

J. T. Matlock, District Attorney, and *Chipman & Garter*, for appellants.

J. F. Ellison, for respondent.

MORRISON, C. J., delivered the following opinion:

This was a proceeding by certiorari to review the action of the defendants, acting as the Board of Supervisors of Tehama County, in awarding a certain contract to one Pryor.

On the fourth day of November, 1879, said Board made an order directing its clerk to advertise for bids to do the county printing from February 1, 1880, to February 1, 1881, and in pursuance of such order, a notice was given that sealed proposals would be received for doing such printing on or before December 1, 1879. On the last-named day two sealed proposals to do said printing were filed in the office of the Clerk of the Board, one of which was the bid of Pryor and the other the bid of the plaintiff, Townsend, the former offering to do said printing for the price of two hundred and fifty dollars, and the latter proposing to do the same for five cents. Townsend's bid was rejected by the Board on the ground that "the same was not a bid," and Pryor's bid being accepted, the contract was awarded to him. Townsend then applied to the Superior Court of Tehama County for a writ of certiorari, and that Court, by its judgment, ordered and adjudged as follows:

"It is therefore ordered, adjudged and decreed that the acts of the Board of Supervisors of Tehama County of the

second day of December, 1879, in awarding a contract for county printing to J. H. Pryor for one year from the first day of February, 1880, for the sum of two hundred and fifty dollars; and also the act of said Board of Supervisors of the same day, in declaring that the bid of A. Townsend was not a bid, and the order rejecting the same, be canceled, set aside, and declared null and void, and that said Board of Supervisors be ordered at their first meeting to award the contract for county printing from the first day of February, 1880, to A. Townsend, under his said bid for the sum of five cents, upon his executing a good and sufficient bond for faithful performance of work under said contract."

It is perfectly obvious that the portion of the above judgment which orders the Board to award the contract to Townsend is erroneous and cannot be sustained. Section 1075 of the Code of Civil Procedure, relating to this writ, provides that when a full return has been made the Court must hear the parties, "and may thereupon give judgment either affirming, or annulling, or modifying the proceedings below." It was not competent, therefore, for the Court to make the writ of certiorari subserve the purpose of a writ of mandamus, which it did, by its judgment in this case.

But is this a proper case to be reviewed by this proceeding? The writ can only issue "when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer," and was the action of the Board of Supervisors in rejecting the bid of the plaintiff, and awarding the contract to Pryor of a judicial nature, and an act in excess of its jurisdiction?

The Board, in determining to whom the contract should be awarded, was absolutely obliged to award the contract to the lowest bidder, or it had a right to exercise its discretion in the matter. If it was obliged to give the contract to the lowest bidder, it follows that there was nothing in the power which was judicial in its nature, but it was purely ministerial. If, on the other hand, the Board possessed a discretionary power in the premises, the most that can be said against its action is, that it was erroneous and not an act in excess of its jurisdiction. In neither case is certiorari the proper remedy. (*The Central Pacific Railroad Company vs. The Board of Equalization of Placer County*, 43 Cal. 365; *Andrews vs. Pratt*, 44 Cal. 309.)

Judgment reversed, and the Superior Court is hereby directed to dismiss the writ.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

IN BANK.

[Filed January 18, 1881.]

No. 10,591.

THE PEOPLE, RESPONDENT,

VS.

AH LOY, APPELLANT.

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL. Where, on a trial for assault with intent to kill and murder, the Court charged that to convict the jury must find that if death had ensued from the wound inflicted, the offense would have been murder either in the first or second degree: *Held*, a correct statement of the law applicable to the case.

CHARGE TO JURY—UNSATISFACTORY DEFINITION OF "REASONABLE DOUBT." Where on a criminal trial the Court charged that a "reasonable doubt does not mean a mere doubt, but a doubt which is founded in reason, and which grows out of the reasoning of intelligent minds upon the doubt," and it was objected that the definition was without meaning: *Held*, that if the definition was meaningless it could not prejudice the defendant in a substantial right, and that if defendant desired a more satisfactory definition he should have asked for it.

Appeal from the Superior Court of San Francisco City and County.

J. Mowry, for appellant.

A. L. Hart, Attorney-General, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This case comes before us on the judgment roll alone, and the only grounds of alleged error are to the charge of the Court to the jury.

The prosecution was by information, and the charge was assault with intent to kill and murder. The Court charged the jury that in order to find the defendant guilty, as charged in the information, they must find that if death had ensued from the wound inflicted, the offense would have been murder in either the first or second degree. This was a correct statement of the law applicable to the case. The remainder of the charge which it is claimed was erroneous, was the definition given by the learned Judge of the term "reasonable doubt." "Reasonable doubt," said the Court, "does not mean a mere doubt, it means a doubt which is founded in reason, and which grows out of the reasoning of intelligent minds upon the doubt." It is claimed that the definition is without meaning, and therefore the judgment should be reversed.

If we were to concede the correctness of the statement, that the definition has no meaning at all, and is wholly unintelligible, it would not follow, as a legal consequence, that the judgment should be reversed. If the jury did not understand the definition, if it conveyed to their minds no just and intelligible conception of what the law means by the term "reasonable doubt," it can hardly be concluded that the alleged absence of meaning in the instruction affected the defendant prejudicially in a substantial right, and that therefore the case calls for a reversal. Other parts of the charge were correct. The jury were told that they must be convinced to a moral certainty that the shot was fired by the defendant; that demonstration was not required, but that a moral conviction was absolutely necessary. The Court also brought to the attention of the jury the distinction which exists between civil and criminal cases, telling them that a preponderance of evidence was sufficient in a civil case, but that in a criminal case something more was required, and that in such a case the fact of defendant's guilt must be established beyond a reasonable doubt. If the defendant wanted a more satisfactory definition of the term "reasonable doubt," he should have asked for it, and if asked to do so the Court would doubtless have given Chief Justice Shaw's definition of the term in the Webster case.

We find no error in the charge which could have affected any substantial right of the defendant, and the judgment is therefore affirmed.

We concur: Myrick, J., Sharpstein, J., Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed January 21, 1881.]

No. 5814.

PEOPLE EX REL. COMMISSIONERS OF TRANSPORTATION,
RESPONDENT,
VS.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
APPELLANT.

By the Court:

Upon the authority of *People ex rel. Commissioners of Transportation vs. The Central Pacific Railroad Company*, No. 5815, judgment reversed, and Court below directed to dismiss the action.

DEPARTMENT No. 1.

[Filed January 17, 1881.]

No. 7418.

L. AUCKER, RESPONDENT,

VS.

DENNIS AND ANNA MCCOY, APPELLANTS.

JURISDICTION OF JUSTICES' COURT IN CASE OF DEFECTIVE PLEADINGS. Where a title was derived through an action in a Justice's Court on a complaint against a husband and wife, alleging that the wife purchased merchandise of the value and for which she agreed to pay \$242.29, on delivery, that the merchandise was delivered to her, that afterwards she married, and asking judgment against both for the sum agreed on; and it was objected that there was no cause of action alleged upon which the Court could exercise its jurisdiction for the reason that it was not alleged that the merchandise was sold and delivered at request of defendants or either of them, or that either was indebted to plaintiff: *Held*, that the want of the averments referred to was a fault in pleading, which might have been reached by demurrer; but it did not affect the jurisdiction which the Court had of the cause of action and of the parties; and that, therefore, the judgment of the Justices' Court was not void.

ACTUAL RESIDENCE ESSENTIAL TO RENDER DECLARATION OF HOMESTEAD ESSENTIAL. Where a homestead was set apart out of the estate of a deceased person by a Probate Court to the widow, and afterwards the widow and her newly-married husband filed an additional homestead claim upon an adjoining lot of land; but it appeared that the husband and wife, although they used the additional lot for business purposes, resided exclusively upon the lot set apart by the Probate Court: *Held*, that to render a declaration of homestead effectual the claimant must actually reside on the premises when the declaration is filed; and that therefore there was no valid additional homestead lot.

Appeal from the Superior Court of San Bernardino County.

Paris & Allen and H. Goodall, for appellants.

J. D. Boyer, for respondent.

McKEE, J., delivered the opinion of the Court:

This was an action of ejectment to recover possession of a parcel of land, described in the complaint, of which the defendants were in possession at the commencement of the action. The plaintiff concedes that the defendants were, at one time, the owners of the land; but he claims that their title has been transferred to him by a constable's deed, made and delivered to him, in consummation of a forced sale, under an execution, which had been issued upon a judgment against the defendants, and was levied upon the land in dispute. The Court below found in favor of the plaintiff's

claim of title, and from the judgment and order denying a motion for a new trial the defendants appeal.

It is contended on their behalf: 1. That the judgment upon which the execution was issued is void, because the Court in which it was rendered had no jurisdiction; 2. That the constable's deed did not transfer to the plaintiff their title, because the land was, at the date of the execution levy and sale, the homestead of the defendants, and not subject to forced sale.

1. The execution was issued on the judgment of a Justice's Court rendered on the twenty-first of June, 1879. He who asserts a right under such a judgment must show affirmatively that the Court in which it was rendered had jurisdiction; being a Court of inferior jurisdiction, no presumptions are indulgible in its favor. The judgment under consideration was rendered in an action of which the Justice's Court had exclusive jurisdiction, and it had acquired jurisdiction of the persons of the defendants. But the point made against the judgment is, that there was no cause of action stated in the complaint in the action upon which the Court could exercise its jurisdiction.

In the complaint, it was, in substance, alleged, "that at various times between the eighteenth day of April and the twelfth day of October, 1878, at the town of San Bernardino, the defendant, Anna McCoy, purchased merchandise of the mercantile firm of L. Aucker & Co., of the value, and for which she agreed to pay the sum of \$242.29, on delivery to her;" that the said merchandise was delivered to her, "at various times between the twelfth day of October and the eighteenth day of September, 1878;" that in March, 1879, the claim had been assigned to the plaintiff; and that after the delivery of the merchandise the defendant, Anna, had intermarried with her co-defendant, and judgment was asked against both for the sum of \$242.29 and costs.

Because the complaint does not contain an averment that the merchandise was sold and delivered at the request of the defendants, or either of them, or that they, or either of them, were indebted to the plaintiff therefor, it is contended that the Court had no jurisdiction of the action. We think, however, that the complaint contained a sufficient statement of facts to constitute a cause of action in a Justice's Court. In those Courts a pleading is not required to be in any particular form. (Section 851, C. C. P.) It is sufficient if it shows the value of the claim asserted by the plaintiff against the defendant in such a way as that a person of common understanding may know what was intended. (Sec. 851, *supra*;

Liening vs. Gould, 13 Cal. 598; *Stuart vs. Lander*, 16 Id. 374.)

There is no difficulty in determining from the complaint that the plaintiff in the action demanded a judgment against the defendants for \$242.29 for merchandise which had been sold and delivered to the defendant Anna. The want of an averment that the goods were sold and delivered at the request of the defendants, or that they were indebted to the plaintiff for them, was a fault in pleading which might have been reached by demurrer; but it did not affect the jurisdiction which the Court had of the cause of action, and of the parties to the action; and the judgment entered in the action was not void. It may have been reversible for error; but being rendered by a Court which had jurisdiction of the parties, and of the defectively stated cause of action, it was valid and operative until appealed from or reversed. However erroneous it might be, it was not the subject of collateral attack. (*Choyinski vs. Cohen*, 39 Cal. 501; *Moore vs. Martin*, 38 Cal. 428.) Nor is a sale of land under an execution issued upon it subject to be defeated for any errors or irregularities in it.

2. The execution, which had been issued upon the judgment, was levied upon the land in controversy as the property of the defendant Anna, on the third day of July, 1879. At that date defendants claim to have acquired a homestead upon the land by a declaration of homestead which they had made and filed on the twenty-third day of May, 1878—immediately after their marriage. The declaration recites that they claimed the land as a homestead in addition to a homestead which had been set apart by the Probate Court of San Bernardino County, out of the estate of William Baldwin, deceased, to the defendant Anna as the surviving widow of the deceased; and it shows that the land selected as an additional homestead abutted upon the homestead premises which had been set apart by the Probate Court. Upon this additional homestead there were some small houses and a stable. The former, defendants rented to tenants; the latter they used, in connection with the premises which they occupied, as a hay yard, for keeping and feeding live stock for profit. Both the homestead lots were enclosed by one fence, and defendants indiscriminately used them for their business purposes. But they resided exclusively on the homestead premises which had been set apart by the Probate Court. At the time of making and filing their declaration, they did not reside upon the additional homestead premises—the land in controversy. They never did reside there until November, 1879, when the family residence on the first homestead

was destroyed by fire, and they moved into one of the tenement houses upon the "additional homestead" lot.

Residence upon premises is an essential element to a claim of homestead; and, unless it is proved to have existed at the time of making and filing the declaration of homestead, the claim is ineffectual. To constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed. (Section 1263, C. C.; *Babcock vs. Gibbs*, 52 Cal. 629; *Dorn vs. Howe*, Id. 630.)

Judgment affirmed.

We concur: McKinstry, J., Ross, J.

IN BANK.

[Filed October 19, 1880.]

No. 6980.

L. HEURSTAL, RESPONDENT,

vs.

HUGH MUIR, APPELLANT.

CONTEMPT FOR RE-ENTERING UPON LAND—ORDER FOR RESTITUTION AN INCIDENT. Where an order, adjudging a party guilty of contempt in re-entering upon land from which he had been removed upon process duly served and issued upon a judgment in an action of ejectment, also directed that an alias suit of execution and restitution issue: *Held*, that the portion of the order directing the alias suit to issue was merely incidental to the adjudication of contempt.

APPEAL FROM A VOID ORDER. Where a motion was made to dismiss an appeal from an order adjudging a party guilty of contempt; and the appellant resisted on the ground that the order appealed from was void: *Held*, that appeals have often been entertained from judgments and orders void in law.

REMEDIES AGAINST PROCEEDINGS FOR CONTEMPT. If a judicial officer is about to exceed his jurisdiction, by trying for a contempt without legal power to do so, the party threatened may stay the proceeding by prohibition; if he actually adjudges one guilty of contempt without jurisdiction, his judgment may be annulled by certiorari; and if the judgment imposes an imprisonment, the prisoner may be discharged on habeas corpus.

DISMISSAL OF APPEAL FROM ORDER ADJUDGING CONTEMPT. Where, on an appeal from an order adjudging a party guilty of contempt, the record showed that the Court had no power to make the order: *Held*, that the appeal could not be sustained and should be dismissed.

Appeal from the District Court of the Fifteenth Judicial District, Contra Costa County.

A. H. Griffith, for appellant.

Temple Emmett, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

This is an appeal from an order of the late Fifteenth Judicial District Court adjudging the defendant, Hugh Muir, guilty of contempt for that, after having been removed from certain premises upon process duly served and issued upon a judgment in an action of ejectment, the said Muir had, without right, re-entered; and also directing that "an alias writ of execution and restitution issue." Respondent has moved that the appeal be dismissed.

It has been suggested that the portion of the order directing that an alias writ issue may be separated from the rest, and an appeal be entertained from such portion. But that portion of the order is based upon the adjudication with respect to the contempt, and is merely incidental to such adjudication. The order is a whole, and if the appeal cannot be sustained as to the whole, it must fail as to every part. The Court below having found defendant guilty of the contempt had no discretion to refuse the writ. (C. C. P., 1210.)

The order is entitled: "In the District Court of the Fifteenth Judicial District, in and for the City and County of San Francisco," and was filed with the Clerk of the District Court of said city and county. The action was pending in the Fifteenth District Court in and for the County of Contra Costa. It may be assumed that the order has never taken effect as a valid order, because not entered by or filed with the Clerk of the Court for Contra Costa, as required by the Act creating the judicial district. (Statutes 1863-4, p. 479.) Nevertheless, it must be treated as being what it purports to be—an order of the Fifteenth District Court for San Francisco.

It is claimed by appellant that the order is void; but appeals have often been entertained from judgments and orders void in law.

This brings us to the question whether the order adjudging the party guilty of contempt is appealable. In *People vs. O'Neil* (47 Cal. 109), it was held: "An appeal may be taken from a judgment for contempt, when the fine is for \$300, and the Court below has exceeded its jurisdiction, and there are facts *dehors* the record, which can only be brought up on a statement on appeal." We are not inclined to extend the authority of that decision so as that it shall include any case differing in its circumstances, or not limited by the conditions therein considered as material. In the case now before us no fine of \$300 was imposed by the Court below; neither does it appear that there are facts *dehors* the record which could only be brought up by statement or bill of exceptions.

It may be remarked, also, that the affidavits and papers found in the transcript are in no way identified as having been used at the trial of the alleged contempt.

The question then is, whether, on a record which shows that an order adjudging a party guilty of contempt, by a Court which had no power to make an operative order in the manner in which this order was made, can be reviewed on appeal.

Persons committed for contempt by the District Court have been discharged on *habeas corpus* on the ground that, in the particular circumstances, the Court had no jurisdiction to adjudge the contempts. (6 Cal. 318; *Id.* 319; 7 Cal. 181.) But these cases do not strengthen the argument in favor of hearing appeals from contempt judgments and orders.

Section 1222 of the Code of Civil Procedure provides: "The judgments and orders of the Court or Judge made in cases of contempt are final and conclusive." This section is not intended to declare the absurdity that such judgments when rendered without jurisdiction, may not be annulled by a proper proceeding. To give effect to its language, judgments and orders in cases of contempt must be held to be "final and conclusive" in the sense that they are not appealable.

In *People vs. Wright* (27 Cal. 151), a writ of prohibition issued to arrest the proceedings of a County Judge who was about to try and punish a recalcitrant party for disobedience of an order of the District Court. In *Batchelder vs. Moore* (42 Cal. 411) a contempt order of the County Court was annulled by certiorari; and it must be remembered that certiorari can be resorted to only where there is no appeal.

It appears, therefore, that if a judicial officer is about to exceed his jurisdiction by trying for a contempt without legal power to do so, the party threatened may stay the proceeding by prohibition; if he actually adjudges one guilty of contempt, without jurisdiction, his judgment may be annulled by certiorari; and if the judgment imposes an imprisonment, the prisoner may be discharged on *habeas corpus*. The remedy of the party injured in each case is ample by resort to a common law or a statutory writ.

We find no authority for the position that an order adjudging one guilty of contempt may be appealed from simply on the ground that the record shows want of jurisdiction to render the judgment. It is admitted, on all sides, that if the lower Court has jurisdiction, such an order is not appealable.

The appellate jurisdiction of this Court cannot depend upon the presence or absence of jurisdiction in the Court

below. We have jurisdiction to hear appeals in all cases of contempt judgments—when the question presented by the record is simply as to the jurisdiction of the lower Court—or in none; since in all such cases, when we pass upon the jurisdiction of the Court below, we pass upon the merits of the appeal.

Motion granted.

We concur: Ross, J., Thornton, J., Myrick, J., Sharpstein, J.

IN BANK.

[Filed January 21, 1881.]

No. 6588.

THE LOS ANGELES IMMIGRATION AND LAND CO-
OPERATIVE ASSOCIATION, RESPONDENT,

vs.

LOUIS PHILLIPS, APPELLANT.

SPECIFIC PERFORMANCE WILL NOT BE ENFORCED ON THE MERE BASIS OF A CONTRACT. A Court of equity will not specifically enforce any contract unless it be complete and certain, nor will it specifically enforce that which is only the basis of an agreement, and not the agreement or contract itself.

QUESTION OF ACCEPTANCE OF DEED AS PART OF COMPLICATED CONTRACT—REASONABLE TIME FOR EXAMINATION. When four different papers, including a deed, relating to and involving the settlement of complicated transactions concerning valuable lands, were handed to a party as he was about leaving on a train of cars, and one of them, not the deed, was partly read when the party said he understood it, took the papers, and remarked it was all right; but, after examining them, consulted his attorney, and some forty days afterwards, during which fruitless negotiations for a compromise were going on, returned three of the papers, including the deed: *Held*, that, under the circumstances, there was no acceptance of the deed as a binding contract.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Thom & Ross, Godfrey & Hutton, and Glassell, Smith & Smith,
for appellant.

T. H. Smith and G. C. Gibbs, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to compel the performance by defendant of a contract alleged to have been entered into by him with the plaintiff corporation.

It is alleged in the complaint that some time in April, 1875, the plaintiff and defendant entered into two certain

contracts for the sale of lands by the latter to the former; that in July, 1875, the parties above named entered into another contract for the sale of a tract of land by the defendant to the plaintiff; that in one of the tracts of land above referred to as agreed to be sold in April, 1875, one Tonner had an interest which he agreed to sell to plaintiff, but that the purchase money due to Tonner had been fully paid, and, therefore, he (Tonner), had no longer any interest in the matter in litigation; that by the terms of two of the contracts above referred to, portions of the purchase money were to be paid in cash, and the remaining portions at days in the future, specified in said contracts, with interest, as set forth therein; that the cash payments were made as agreed on, and promissory notes were executed for the credit payments; that by the terms of the contracts it was stipulated between the parties that the plaintiff should have the right, at any time within three years next after the dates of the contracts respectively, to sell any of the lands described in the contracts at not less than thirty-five dollars per acre; that the defendant would join in a bargain and sale deed to the purchasers upon condition that at the same time there should be paid to the defendant an amount of money equivalent to thirty-five dollars per acre for the portion of land thus sold, and an additional amount equal to one-half of the difference between the sum of thirty-five dollars and the price for which such portion of land should be sold, the money so paid to defendant to be received by him and credited upon the promissory notes before mentioned until they were fully paid off.

It is further averred that the possession of said tracts of land were delivered to plaintiff by the vendors Tonner and the defendant; that plaintiff entered into such possession, and caused permanent and valuable improvements to be made on the said tracts of land of the value of \$25,000, and held possession of said tracts until the execution of a deed from plaintiff to defendant on the thirty-first day of December, 1877, as afterwards set forth in the complaint; that before the fifteenth of November, 1877, plaintiff sold to numerous persons various portions of the several tracts of land above mentioned, took from each of the purchasers promissory notes, drawing interest, for the purchase money of the lands sold, and at defendant's request endorsed and delivered to him the said notes and contracts as collateral security for the payment of its notes to defendant, and made divers payments in money to defendant on account of the aforesaid purchase from him—all of which are fully stated

in an exhibit to the complaint; that on or about the fifteenth of November, 1877, for the purpose and intent of making a full settlement of all dues, debts, etc., then existing between them, plaintiff and defendant entered into a contract in writing, by the terms of which, and in consideration of the mutual promises therein contained, defendant bound himself to purchase from the plaintiff all the lands described in the contracts above mentioned, then remaining unsold, and then known as the Pomona lands and the Pomona tract, at the rate and price of \$35 per acre; and that defendant would credit plaintiff's notes held by him, as above set forth, with the value of said unsold lands at the rate of \$35 per acre; and that he (defendant) would purchase enough of the contracts of purchase then held by him as collateral security, for their face and the interest due thereon, to fully pay all of plaintiff's obligations to defendant; and that he would convey to plaintiff, by deed, all the remaining lands embraced in said original contracts, and before that time sold to plaintiff, and would assign to plaintiff the contracts entered into, and promissory notes given by purchasers for said lands last named, then held by him as collateral; that it was by said contract further agreed between the parties aforesaid, that a corporation should be created and organized under the laws of the State of California, by Thomas A. Garey, the President of the corporation plaintiff, the defendant and any persons who might be disposed to subscribe for its stock; that the object and purposes for which said corporation was to be created were to develop the waters of San Antonio Creek, a stream of water flowing near the said Pomona lands, with which to irrigate said lands; to sell the water for purposes of gain to the inhabitants of Pomona; that the capital stock of said corporation was to be \$25,000, of which defendant agreed, by the contract just referred to, to take \$10,000, and to pay assessments thereon from time to time as fast as the corporation should require the funds to carry into effect the purposes for which it was formed, such assessments not to exceed in the aggregate fifty per cent. of the par value of the stock; and the plaintiff bound itself to see that the balance of said stock was taken on like terms, and to procure the obligations of said Garey and one H. J. Crow, and each of them to give the defendant the first right to purchase all stock taken by them in said corporation, at any time, within two years from the time that the waters of San Antonio Creek should be brought to the town of Pomona by said corporation, and to transfer to said corporation all the capital stock of a corporation known as the Pomona Water Com-

pany, then owned and held by plaintiff; that by the terms of said contract, defendant was to have the right to the use of water from said corporation to be formed, sufficient to irrigate certain lands mentioned in said contract, for which defendant was to pay as provided by its terms; that plaintiff complied with the terms of said contract on its part to be performed; that defendant failed to take the stock in said corporation which was formed, or to pay any money on it, or to perform any of the obligations of said contract upon his part to be performed, to the damage of plaintiff in the sum of \$15,000 United States gold coin; that said Garey and Crow each subscribed for sixty-three shares of the stock of said corporation of the par value of \$6,300; that \$12,500 would have been sufficient to build and construct the flumes, ditches and other works of said new corporation, and would have enabled said company to introduce the waters of San Antonio Creek upon the Pomona lands, and to have irrigated all the unsold portions thereof, and to have brought said waters on the lands of defendant, to have irrigated the same as required in the said contract, and would have provided said water company with a large surplus of water, which it would have sold; that on the thirty-first of December, 1877, the plaintiff delivered and the defendant accepted the obligations in writing of said Garey and Crow, to give to the defendant the refusal of the stock taken by them in said corporation above-mentioned, at any time within two years from the time that the waters of said San Antonio Creek should be brought to the town of Pomona by said water company, and the plaintiff also on the same day delivered to the defendant, who accepted the same, a deed in due form of law, duly executed and acknowledged by plaintiff, conveying to the defendant all the estate of plaintiff in and to all the unsold lands and the unsold portions of the Pomona track mentioned in said contract, which conveyance defendant has ever since retained; that on the delivery and acceptance of said deed, the plaintiff demanded of defendant that he should comply with the stipulation of said contract on his part to be performed, which defendant refused and still refuses to do, to the damage of plaintiff in the sum of \$22,676.96, in gold coin; that since said demand, defendant has wrongfully sold and assigned to other parties, whose names are unknown, whereby he has put it out of his power to perform the obligations of said contract, to the damage of plaintiff in the sum of \$22,676.96; wherefore, plaintiff demands judgment against defendant for the sum of \$37,676.96, in United States gold coin, for his damages; that plaintiff's promissory notes and obligations for the pur-

chase price of said lands be declared to be fully paid off and satisfied, and that defendant be ordered and directed by the Court to surrender up said notes and obligations to be canceled, and that plaintiff may have such other and further relief in the premises as to the Court may seem equitable and just, with costs of suit.

Defendant answered the complaint, and denies on information and belief, that plaintiff is or was at any of the times stated in the complaint a corporation duly organized or existing under the laws of California. He admits the executions of the contract stated in the complaint executed in April and July, 1876; that plaintiff entered into the possession of the lands referred to in said contracts, under the terms thereof. He denies that plaintiff ever placed or erected on said lands permanent or other improvements of the value of \$25,000; that on the thirty-first of December, 1877, or at any other time, plaintiff executed to him any deed; denies any contract as alleged entered into by him with plaintiff, on or about the fifteenth of November, 1877. Defendant further denies performance of the terms of said contract by plaintiff, as alleged in the complaint, or that he refused to subscribe, or take or pay for \$10,000 stock in the new water company, or that he has failed in any manner or at all to perform any obligation on his part, or that he has damaged plaintiff in any way or sum, or at all. He avers that neither the plaintiff nor the said water company ever had any interest or right to the water of the Arroyo of San Antonio or any part thereof, and further avers that the said water and the right to its use during all the times mentioned in the complaint, and ever since, has been and now is the property of other parties. He denies the delivery by the plaintiff at any time or the acceptance by defendant of any obligation of Garey and Crow or either of them, or the delivery by plaintiff of any deed executed to him on the thirty-first of December, 1877, or at any time, or that he has retained in his possession at any time such deed, and denies that plaintiff has ever kept or performed the terms of any contract with him. Denies any damage to plaintiff in any sum; that he (defendant) has at any time wrongfully or fraudulently sold or assigned or transferred any of the contracts in the complaint mentioned to the damage of plaintiff in any sum whatever. He admits that on or about the fifteenth day of November, 1877, he signed a paper writing with Thomas A. Garey and F. B. Fanning, who pretended to act for and as President and Secretary of plaintiff, and avers that said instrument was signed by him without any consideration whatever, and because of the false and fraudulent

representations made to him by Garey and Fanning and H. J. Crow, who was interested therein with Garey and Fanning, which representations were at the time known to Garey, Fanning and Crow to be false and fraudulent, but then believed by defendant to be true. He further avers that said paper writing was and is absolutely void and of no effect. The cause was tried by the Court, and judgment was rendered for plaintiff. The defendant moved for a new trial, which was denied, and he took an appeal from the judgment and the order denying his motion for a new trial.

The decision of this cause turns mainly on the construction of certain documents which appear or are referred to in the findings.

The Court below having found the facts as to the three contracts for the purchase of lands mentioned in the complaint, the possession of the plaintiff of the lands embraced in these contracts, the payments made to defendant on these purchases, the sales made by plaintiff of portions of the lands, and the transfer of the notes and contracts by plaintiff to defendant as collateral security in accordance with the terms of the contracts above referred to, proceeds to make the following finding :

"About the fifteenth day of November, 1877, and before the twenty-second day thereof, for the purpose of and with the intent of making a full and complete settlement of all demands then existing between them, plaintiff and defendant entered into an agreement, the substance of which plaintiff has purported to set forth in paragraph XI of the complaint herein, but in fact said contract or agreement was to the effect and in the words and figures as follows, and not otherwise:

"Memorandum of items of agreement between Louis Phillips and the Los Angeles Immigration and Land Co-operative Association, as a basis on which to conclude a contract for the sale to said Phillips of the remaining portion of land at Pomona; Phillips proposes to buy all unsold lands in Pomona, and the Pomona tract, for the sum of \$35 per acre, and give credit for the same on notes held by him against the company. He (Phillips) agrees also to purchase contracts for lands already sold by said association for their face and interest thereon sufficient to cancel the notes held by him against the association, and to deed to the said association all remaining lands sold by them under contract, and signing over to them the said contracts. Phillips, Garey *et al.* are to incorporate a Water Company, with a capital stock of \$25,000, to handle the San Antonio waters. Phillips

is to take \$10,000 of the stock in said Water Company, paying thereon 50 per cent. by the time that said company shall need funds. The Land Association are to see that the balance of the stock is taken on the same terms. Phillips is to have the first refusal to purchase all stock taken by Garey & Crow at any time within two (2) years from the time that the said waters of San Antonio are brought to the town of Pomona by said Water Company. The said Land Association are to transfer to the aforementioned new Water Company all the stock now remaining in the hand of the Pomona Water Company; Phillips is also to have the right to water from the said new Water Company for unsold portion of Pomona and Pomona tract; also for one thousand acres, more or less, of his other dry lands, upon the payment by him of a royalty of \$10 per acre.

"Los Angeles Immigration and Land Co-operative Association, by "THOS. A. GAREY, President."

It is urged on behalf of appellant that the document set forth in the above finding is not an agreement or contract, but merely the basis of an agreement. The respondent, on the contrary, insists that it is a contract full and complete in all its parts, and executed, a breach of which has been committed by defendant, for which he is responsible to the plaintiff. The respondent's view of this document was taken by the Court below.

A Court of equity will not specifically enforce any contract unless it be complete and certain. (*Honeyman vs. Marryatt*, 21 Beav. 14; 6 H. L. Cas. 112; *Stratford vs. Bosworth*, 2 V. & B. 341; *Tawney vs. Crowther*, 3 Bro. C. C. 318.) This rule applies as well to parties as to price, subject-matter, etc. Nor can the aid of a Court of equity be had to specifically enforce that which is only the basis of an agreement, and not the agreement or contract itself. (*Frost vs. Moulton*, 21 Beav. 596; *Losee vs. Morey*, 57 Barb. 561; see also *Pomeroy on Contracts*, Secs. 145-147; *Fry on Specific Performance*, Secs. 342 and 203, *et seq.*)

Upon an examination of the foregoing document as found by the Court below, it will be observed that its title indicates that as a contract it is incomplete. The title is: "Memorandum of items of agreement between Louis Phillips and the Los Angeles Immigration and Land Co-operative Association, as a basis on which to conclude a contract for the sale to said Phillips of the remaining portion of land at Pomona." Thus it is not treated as a contract concluded, but "as a basis on which to conclude a contract for the sale to Phillips" of the land referred to. There are other circumstances in

this document which indicate the incompleteness of the paper as a contract. It purports to be made between the plaintiff and the defendant as a memorandum for their action, yet it goes on to provide that "Phillips, Garey *et al.* are to incorporate as a Water Company with a capital stock of \$25,000, to handle the San Antonio waters;" and further, "Phillips is to have the first refusal to purchase all stock taken by Garey and Crow at any time within two years from the time that the said waters of San Antonio are brought to the said town of Pomona by said Water Company."

Who Garey *et al.* (who are mentioned with Phillips as above pointed out) are, does not appear from the paper. To be sure, the name of Thos. A. Garey is appended to the paper as the President of the plaintiff corporation. But whether this is the Garey mentioned above, we can only conjecture. At any rate, although it is stipulated that Garey *et al.* are to do something of great importance, they are not mentioned as parties to the so-called agreement, nor do they sign it. The same is true as to the stipulation that Phillips is to have the first refusal to purchase all the stock taken by Garey and Crow at any time, etc. Neither of them have signed the paper, nor is Crow mentioned as a party to the agreement. There then is no agreement in this document binding on Garey or the persons embraced in the expression "*et al.*" to do anything, nor is there in it any stipulation binding Crow or any one else to sell any stock at any time to Phillips. Phillips could never, under this paper, have enforced anything as against Garey and Crow, nor could he have recovered any damages for the breach of anything contained in it. Further, it is set forth in this paper that Phillips is "to have the right to water from the said new water company for the unsold portion of Pomona and Pomona tract; also, for one thousand acres, more or less, of his other dry lands, upon the payment by him of a royalty of \$10 per acre." Where are the other dry lands referred to? There is nowhere found any description of them. It is impossible to say what lands are here referred to as Phillips' "dry lands," to irrigate which water was to be furnished on the terms mentioned. These considerations drawn from the paper itself, show that it was not to be regarded as a contract complete in all its parts, but as a memorandum of items from which the parties might on a future occasion draw up *in extenso* a contract complete as regards the matters referred to in it, and certain in its terms, and to which other persons are to be parties.

There are other considerations which lend force to this

conclusion. A most essential part of the arrangement contemplated between the plaintiff and defendant was to devise some means to develop and make useful the waters of San Antonio Creek, and it is expressed in the document just referred to, "to handle the San Antonio waters." The Court finds that "neither the plaintiff nor the said new water company ever had any title to the water of said Arroyo San Antonio or any part thereof, and said water and the rights to its use during all the time mentioned in the complaint, ever since has been and now is the property of other parties." (See 13th finding of fact.)

It became necessary to acquire the waters of San Antonio Creek, for they could not be developed or handled unless they were under the control of the parties desiring to develop and handle them.

The testimony in the transcript shows that H. K. W. Bent, A. R. Meserve and C. F. Loop, claimed to have some ownership in these waters. On the 2d of November, 1877, the following instrument was executed at Los Angeles:

"LOS ANGELES, November 2, 1877.

"At a meeting of persons interested in fluming the waters of San Antonio Creek, held this day in the office of H. K. W. Bent, in Los Angeles, at which was present H. K. W. Bent, A. R. Meserve, Rev. C. F. Loop, Louis Phillips, T. A. Garey, H. J. Crow, J. E. McComas and L. M. Holt, the following points were agreed upon: Bent, Meserve and Loop, representing the owners of the half interest in the waters of San Antonio Creek, agree to sell a quarter of the stream to Mr. Phillips and the other gentlemen present for the sum of \$18,750 gold coin. Phillips and his party agree to purchase such water at said price, and pay for the same as follows: They will build a flume from a point near the Kincaid dam to the north line of the Palomeres tract, of sufficient capacity to carry 500 inches of water under a 6-inch pressure. The bottom of the flume is to be of 1½-inch redwood, and the sides of 1½-inch redwood, with clamps every 5½ feet. The flume is to be not less than 2 feet wide and 16 inches deep. They also bear one-half of the expenses of a dam, at or near Kincaid's dam, for dividing the waters, to cost not to exceed five hundred dollars; dam to be located at such point to be mutually agreed upon. If the water is taken from the base side of the stream, then the Phillips party are to construct such an aqueduct across the wash as may be deemed best by a competent board of judges to be mutually selected. The pipe and flume is to be estimated in the trade at \$15,000, and the cost, if greater than that amount, is to be borne by

Mr. Phillips and his party; they (the Phillips party) agree to put in the sum of \$3,750 within three years in improvements for developing water, provided that their cost of the dam, which is to cost not to exceed \$500 (one-half to be borne by Phillips' party), and the cost of a flume from a point even with the Kincaid dam to the dam to be built is to be deducted from the \$3,750. Phillips' party also agree to put a division in the flume from a point not to exceed 2½ inches from the lower end of the flume down to the lower end, in order to divide the waters of Bent, Meserve and Loop from the waters belonging to Phillips' party. The parties hereto hereby agree to consummate this trade and pass all necessary papers within fifteen days from this date.

"A. R. MESERVE,
"H. K. W. BENT,
"THOS. A. GAREY,
"L. M. HOLT,
"C. F. LOOP,
"LOUIS PHILLIPS,
"H. J. CROW."

Here was the commencement of an attempt to acquire an interest in these waters. The agreement just above quoted, it will be observed, ends with a stipulation that the parties to it agree to consummate the trade for the waters and pass all necessary papers within fifteen days from its date.

The memorandum first above quoted made a few days later in the same month of November, 1877, refers to "the handling" of these waters by certain parties, through the means of a corporation. This is to be done by "Phillips, Garey *et al.*" Here we have some light thrown on the question who "Phillips, Garey *et al.*" are, but whether they are all the signers to the instrument of November 2, or those of the signers who are styled in the last-mentioned paper "the Phillips party" does not clearly appear.

The above instruments in writing, which constitute such an important feature in this case, suggest that the consummation of the agreement, the memorandum of the items of which appear in the instrument of November 15, was to depend on the consummation of the contract of November 2, in regard to the San Antonio waters. The uncontradicted facts in the cause show that there was a difficulty in the way of procuring a title to these waters. The claim of Bent, Meserve and Loop was disputed, and in fact, in March, 1876, a judgment against Bent and his co-claimants had been entered in the District Court for Los Angeles County, in an action brought by them (Bent, Meserve and Loop) against

certain parties to enjoin them from diverting these waters. That the memorandum of November 15, and its being carried out, was intended to turn upon the acquisition of the San Antonio waters, is sustained by the testimony of Bent and Holt. Such, also, is the testimony of Phillips. The documents themselves and the testimony generally strengthen this conclusion. A conveyance of the San Antonio waters was never made either to plaintiff or defendant. The decree was against Bent, Meserve and Loop, and although a compromise was effected, which was reduced to writing, and signed by Meserve and Loop, it does not appear that Bent ever signed it.

Now, according to the memorandum of the fifteenth of November, 1877, "Phillips, Garey *et al.* were to incorporate a Water Company with a capital stock of \$25,000 to handle the San Antonio waters." That this was a material part of this memorandum of items (as it was styled) there cannot be a doubt. It does not appear that Garey and the other person or persons referred to by the words "*et al.*," ever made any agreement with the plaintiff or defendant, or any other person. There is an entire absence of testimony to establish any agreement to incorporate a Water Company of any character made by Garey with any person whatever. Nor is there any testimony that Garey and Crow ever agreed with any person to transfer to Phillips whatever stock they might take in any such corporation. There is absolutely no testimony to show that they were in anywise bound to Phillips in any such stipulations as those above referred to. Phillips could never have enforced any such agreement, nor could he have recovered damages for the breach of any such stipulations, as no such stipulations ever existed. Still, the decree of the Court proceeds upon the ground that such stipulations existed between Garey and other persons and Phillips. The foregoing considerations show that the memorandum of November 13th, so-called, was incomplete, was not a contract, but was a mere basis for a contract to be framed after further negotiations; and in our opinion, that it neither should be enforced in a Court of equity by the plaintiff against the defendant, nor could any action be maintained upon it by plaintiff to recover damages of defendant.

But it is contended that on the thirty-first day of December, 1877, Phillips accepted a deed of the lands referred to in the document of November 15, 1877, and that, therefore, he has waived all right to object to the incompleteness of the contract, and is bound to carry out the so-called agree-

ment and pay for the lands mentioned in it. Conceding that he would have waived all right to make the objection referred to by accepting such deed, and pay for such lands, we are of opinion that the evidence fails to establish any such acceptance, and that the Court below erred in finding that any such deed was ever accepted.

We will review the evidence in relation to this matter. The only witnesses who testified as to this matter are George C. Gibbs and the defendant. The former (Gibbs) testified that he was a lawyer, a stockholder and one of the directors of the plaintiff's company since its organization in 1874; that on the thirty-first of December, 1877, he delivered four papers to Mr. Phillips at the depot of the Southern Pacific Railroad Company in Los Angeles (among which papers was the deed above referred to); that he read a portion of one of these papers, which was not the deed, to Mr. Phillips—read nearly the whole of it; when he got to a certain point in reading this paper, Phillips said that was enough, he understood it, took the papers witness gave him and left him, and said it was all right. About forty days afterwards, Mr. Ross (Messrs. Thom and Ross were the counsel of defendant) came into his (witness') office with three of the papers he had left with Phillips, one of which was the deed, and remarked that there were some valuable and interesting documents, that he would leave them with him, and left them on his table. "I told him I had no authority to take them." "Phillips made no objections to these instruments that I handed him." On cross-examination the witness said: "I have known Mr. Phillips four or five years pretty well. See him frequently in town—not often. I did not make any effort to find him that day. I knew he came to town that day, and I would be more liable to find him at the cars. Once or twice I tried to find him, but could not hear where he was, only I heard he was in town. I didn't know where his headquarters was. He was standing on the platform when I saw him. The cars did not go for ten or fifteen minutes afterwards. I remained there all the time till the cars left. The deed was executed several days before. It was given me that day—thirty-first December—by the secretary of the company, perhaps an hour before I started to deliver it to defendant. I didn't try to find Phillips in town."

Phillips testifies in relation to this matter, and states that he arrived at the cars in a hack; that Gibbs came to him and said: "Mr. Phillips, I have got some papers. I asked him what papers are they; that he pulled out one, and com-

menced to read it, and by that time they rang the bells for the cars to go, and I said: 'I will take it with me, and read it at home,' and he put it in his pocket, and when he got home there was a deed among the papers. On the third day after, he sent the papers to Thom & Ross, his attorneys."

The testimony shows conclusively that the defendant was at the depot just about to take the cars for his residence at Spadra, when these papers were delivered to him by Mr. Gibbs.

The transcript further shows a stipulation made at the trial that the deed and the other papers above referred to were given to defendant by Gibbs when he (Phillips) started for Spadra; that the reason they were not returned before the time they were put on Gibbs' table, was that there was a compromise pending which was not consummated; that during this time the plaintiff was not informed that Thom & Ross had the papers. Also, that Phillips knew nothing about the papers being kept by Thom.

Upon this testimony, the Court found the delivery of the deed in question by the plaintiff and its acceptance by Phillips. We will remark here that we have not given all the testimony of defendant at this point. We have stated all the testimony which could in any way have a tendency to sustain the finding of the Court below.

To hold on this state of facts that this deed was accepted by Phillips as a binding instrument, would be to sanction an injustice which no Court should countenance. Excluding from consideration entirely the testimony of Phillips, and looking only to the testimony of Gibbs and the stipulation, no such conclusion as that reached at the trial of this cause can be sustained. A reasonable time is allowed by the law to a person to examine the most trifling book account, before the law raises the presumption of an admission of its correctness. Here, this defendant, upon a reading to him of a portion of another paper in which there is a reference to this deed, when he is just about to take a train of cars to leave the spot where the paper is shown him to go to his residence, without an opportunity to inspect the paper held to bind him is held conclusively bound in a complicated transaction, involving interests alleged to be of the value of from \$75,000 to \$100,000, and that without any opportunity to do what every prudent business man would do, consult his counsel. The mere statement of the facts is sufficient to show that a judgment based on such a finding should not be allowed to stand. A greater length of time should be and would be allowed as to a book-account amounting to \$50, before a person would be held

to have admitted its correctness. Mr. Phillips did what every prudent man of affairs would have done under the circumstances, took the papers, sent them to his counsel, and doubtless acted on their advice.

Judgment and order denying new trial reversed, and cause remanded.

We concur: Sharpstein, J, McKinstry, J., McKee, J., Myrick, J.

(Mr. Justice Ross, being disqualified, took no part in the decision of this cause.)

IN BANK.

[Filed January 20, 1881.]

No. 10,567.

THE PEOPLE, RESPONDENT,
vs.
WILLIAM HALL, APPELLANT.

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—RELEVANCY OF TESTIMONY ON PLEA OF JUSTIFICATION. On a trial for assault with intent to kill and murder, where it appeared that a struggle took place between the prosecuting witness and defendant, who claimed to have acted in self defense: *Held*, that any testimony tending to show the nature of injuries received by defendant at the hands of the prosecuting witness, or tending to corroborate defendant's testimony was admissible, and its exclusion, duly excepted to, was error.

PRESUMPTION AS TO ANSWERS MADE TO PROPER QUESTIONS OBJECTED TO AND RULED OUT. Where a proper question asked a witness was ruled out, but the witness answered it, and the Court then directed him not to answer it, and several similar proper questions on the same subject were asked and ruled out: *Held*, that it was to be supposed that the jury disregarded the answer given in disobedience to the order of the Court, and that the exclusion of the proper questions was error, for which the judgment should be reversed.

Appeal from the Superior Court of Stanislaus County.

Johnson & Hazen, for appellant.

A. L. Hart, Attorney-General, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

This was a trial of "an assault with intent to kill and murder." The defendant testified that when in bed for the night he was assaulted and badly beaten by the prosecutor, by whom he was then dragged from his bed, and while the struggle continued between the two, and in another part of the small room in which the affray occurred, he, the defendant, seized upon a knife, with which he inflicted a wound upon his assailant. The prosecuting witness testified that he was standing near the bed, when defendant sprung from it

and struck at him; that the witness returned the blow, and that the fight continued until he received the knife wound.

Mrs. Wm. Clavey testified that she visited the room where the fight took place immediately after it ceased, and found the defendant there. The following is taken from the recital of proceedings in the bill of exceptions:

"Question by the defense—'Describe fully the condition of his head and face.'

"The prosecution objected to the question. The Court sustained the objection. The witness answered:

"His face was cut, bruised and swollen.'

"The Court said to the witness: 'Do not answer that question.'

"The defense then asked the following question: 'State what the appearance of the defendant's head and face was at that time?'

"The prosecution objected to the question. The Court sustained the objection, and refused to allow the question, to which ruling the defendant then and there duly excepted.

"The witness continued in substance as follows: 'There was blood on the blanket and pillow and sheet of defendant's bed.'

"The defense asked the following question: 'Over what extent was the blood spread around?'

"The prosecution objected to the question. The Court sustained the objection, and the defendant duly excepted."

Any evidence tending to show the nature of the injuries received by the defendant at the hands of the prosecuting witness was certainly admissible, and would have aided the jury in determining whether the defendant acted only in necessary self-defense. So the extent to which the bed was blooded would corroborate the statement either of the prosecuting witness or of the defendant, as to there having been any beating of the latter before he arose from his recumbent position.

It cannot be claimed that no injury was done to the defendant at the trial, because some of the questions above cited were answered by the witness. They were answered in direct disobedience to the order of the Court, who expressly held that the testimony was improper. Under such circumstances we must suppose that the jury disregarded the testimony.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., Morrison, C. J., Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed January 8, 1881.]

No. 6607.

THE PEOPLE EX REL. BOARD OF STATE PRISON
DIRECTORS, APPELLANTS,

VS.

M. MILES ET AL., RESPONDENTS.

SUITS AGAINST STATE—NOT ALLOWED EITHER DIRECTLY OR BY WAY OF COUNTER CLAIM OR SET-OFF. A State cannot be sued in her own State, either directly or indirectly, as by setting up a counter claim or set-off; nor can any judgment be recovered against the State, except when the same is permitted by express statute.

Appeal for the District Court of the Sixth Judicial District, Sacramento County.

Jo Hamilton and P. Dunlap, for appellant.

N. Greene Curtis, T. J. Clunie and D. W. Welty, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

We are confronted by a transcript 1221 folios long, consisting in great part of the short-hand reporter's notes in full, etc.

The Court below rendered judgment in favor of the defendant Holmes against the plaintiff. It would seem to be hardly necessary to cite authorities to the proposition that a State cannot be sued in her own State, directly nor indirectly, as by setting up a counter claim or set-off; nor can any judgment be recovered against the State, except when the same is permitted by express statute. (*Raymond vs. State*, 54 Miss. 562; *Chevillier vs. State*, 10 Texas, 315; *United States vs. Eckford*, 6 Wall. 484, *et mult. als.*)

The cases cited by the respondent do not sustain his position. *United States vs. Eckford*, relied upon by him, holds, that when certain credits were pleaded, as allowed by statute, no judgment could be rendered against the United States, even although it should be judicially ascertained that the government was indebted to the defendant.

Judgment and order reversed, and cause remanded for a new trial—appellant to recover no costs.

We concur: Morrison, C. J., Ross, J.

IN BANK.

[Filed January 18, 1881.]

No. 10,590.

THE PEOPLE, RESPONDENT,
vs.

JOHN SHUBRICK, APPELLANT.

CRIMINAL LAW—INFORMATION—JUDGMENT ROLL NOT TO SHOW PROCEEDINGS BEFORE COMMITTING MAGISTRATE. Where, in a criminal case prosecuted by information, it was objected that the judgment roll did not show that the accused was ever examined or committed by a magistrate: *Held*, that Section 1207 of the Penal Code, which provides for the roll or "record of the action," as it is there styled, does not require or permit the proceedings before the committing magistrate to be annexed to it.

INFORMATION NEED NOT SHOW PROCEEDINGS BEFORE COMMITTING MAGISTRATE. An information is not required to contain any averment with reference to the examination of defendant before a committing magistrate.

Appeal from the Superior Court of San Francisco City and County.

James G. Maguire, for appellant.

A. L. Hart, Attorney-General, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The only point argued by counsel for appellant was, that it appeared from the "judgment roll" that defendant had been tried upon an unauthorized information, inasmuch as it nowhere appears that he was ever examined or committed by a magistrate, as required by Section 8, Article I, of the Constitution of the State.

The roll, which by Section 1207 of the Penal Code, the Clerk of the Superior Court is directed to make up and file, is there styled "a record of the action." The section does not require the proceedings before a committing magistrate to be inserted in the record, nor does it permit such proceedings to be annexed to the roll.

The defendant demurred to the information upon the ground suggested. But Section 959 of the Penal Code provides that the information shall be sufficient if certain things therein enumerated "can be understood therefrom." That section does not require nor intimate that the information shall contain any averment with reference to the examination of defendant before a committing magistrate.

Judgment affirmed.

We concur: Ross, J., Morrison, C. J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed January 21, 1881.]

No. 5813.

THE PEOPLE EX REL. COMMISSIONERS OF TRANSPORTATION,
vs.
STOCKTON AND COPPEROPOLIS RAILROAD COM-
PANY.

By the Court:

Upon the authority of *People ex rel. Commissioners of Transportation vs. The Central Pacific Railroad Company*, No. 5815.

Judgment reversed, and Court below directed to dismiss the action.

IN BANK.,

[Filed January 21, 1881.]

No. 6521.

KNOX

vs.

BOARD OF SUPERVISORS OF LOS ANGELES.

PRACTICE IN SUPREME COURT IN BANK WHERE JUSTICES DISAGREE. Where a cause in the Supreme Court in bank was heard by but five of the Justices, and four could not agree on a judgment: *Ordered*, that the submission should be vacated, and the cause placed on the calendar for hearing at a future time.

By the Court:

But five only of the Justices having heard the argument of this case, and four not having agreed as to a judgment, it is ordered that the submission be and the same is set aside, and the case placed on the calendar for argument at the next Los Angeles session.

DEPARTMENT No. 2.

[Filed January 21, 1881.]

No. 6833.

ROOT, NEILSON & CO., RESPONDENTS,
VS.

A. S. BRYANT ET AL., APPELLANTS.

PRIORITY OF LIEN—UNRECORDED MORTGAGE AS AGAINST SUBSEQUENT MECHANICS' LIEN, WHERE WANT OF NOTICE OF MORTGAGE DOES NOT APPEAR. Where, in an action involving a question of priority of liens, the findings showed that one party had a mechanics' lien for work and labor and materials furnished between March and July, 1878, and the other party had a mortgage executed in May, 1877, but not recorded till November, 1878; and the judgment declared the mechanics' lien to be the prior one: *Held*, that the mortgage was the prior lien, unless the claimants of the mechanics' lien had no notice of the unrecorded mortgage; and that in the absence of a finding that they had no such notice, the judgment was erroneous.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

George Cadwalader, for appellants.

George E. Bates, for respondents.

THORNTON, J., delivered the opinion of the Court:

In an action for the foreclosure of a mechanics' lien upon a sawmill and certain buildings and fixtures owned by A. S. Bryant, brought by Root, Neilson & Driscoll, doing business as partners under the firm name of Root, Neilson & Co., against the above-named Bryant, the London and San Francisco Bank (limited) and others, in which was a contest between the plaintiffs and the bank, the Court adjudged that the plaintiffs had the prior lien. The bank moved for a new trial, which was denied, and it prosecuted this appeal from the judgment and the order denying a new trial.

The Court found that the work and labor for which the plaintiffs claim a lien, were performed between the day of March, 1878, and the sixteenth of July, 1878, and the materials were furnished during the same period; that the mortgage under which the bank claims its lien was executed on the third day of May, 1877, and recorded on the eleventh day of November, 1878. The lien of the mortgage then attached on the third day of May, 1877, and prior to the date that the work and labor were done by plaintiffs, or the materials were commenced to be furnished by them.

The lien of the mortgage is then superior to the lien claimed by plaintiffs, unless the plaintiffs at the time they performed the labor or commenced to furnish the materials had no notice of the existence of the then unrecorded mortgage. (C. C. P., Sec. 1186.)

It does not appear from the findings that plaintiffs did not have such notice. To give them priority over the mortgage this should have been found as a fact.

It follows from the above, that the Court erred in adjudging that the lien of plaintiffs was superior to that of the bank.

The order denying a new trial and the judgment are reversed and the cause remanded with directions to the Court below to enter judgment giving the priority to the lien of the bank.

We concur: Sharpstein, J., Myrick, J.

Subsequently, on January 28, 1881, the Court in the above entitled cause of *Root, Neilson & Co. vs. A. R. Bryant et als.*, modified its judgment as follows:

"In this cause, the judgment heretofore rendered is modified so as to read as follows:

"Judgment and order reversed, and cause remanded for a new trial."

In the Superior Court

OF ALAMEDA COUNTY—LATE DISTRICT COURT.

No. 1830.

JEROME B. COX vs. CHARLES McLAUGHLIN.

This action has been pending since April, 1867—now going on fourteen years. The amount involved is large, the plaintiff's claim, including interest, now being in excess of \$300,000; and the labor incident to an intelligent understanding of the case, and the facts and law involved, has been onerous.

HISTORY OF THE CASE.

On April 13, 1867, the plaintiff and Thomas J. Arnold, as plaintiffs, filed a complaint in the late District Court of this county, to foreclose what they claimed to be a lien on the road-bed, track, etc., of the Western Pacific Railroad Company, for labor and materials furnished in the construction of the road-

bed of said road, and bridges, culverts, etc., claiming that there was then due to them for said work and materials the sum of \$173,395.19.

Upon this complaint as subsequently amended, issue was taken by the answer of the corporation defendant; and after various proceedings not now necessary to detail, a trial resulted in a decree foreclosing the lien, and awarding the plaintiffs the sum of \$193,173.80 and \$310 costs.

From this judgment or decree an appeal was taken to the Supreme Court of this State, where, at the July Term, 1872, the judgment was reversed on the ground that the contract under which the work was done was an entire contract, and that no lien could be sustained until the work had all been completed. The action was remanded for a new trial.

The case is reported in 44 Cal., p. 18. Upon the return of the case to the Court below, the plaintiffs amended their complaint on February 17, 1873; and to this complaint defendants demurred on the ground that it failed to state facts sufficient to constitute a cause of action; and this demurrer was sustained by the Court, and final judgment thereon was entered in favor of defendants.

From this judgment the plaintiffs prosecuted an appeal to the Supreme Court, where, at the October Term, 1873, the judgment was again reversed, and the cause remanded for a new trial, on the ground that the complaint averred that the plaintiffs were prevented by defendant McLaughlin from performing the contract. The Court again reiterate that the contract was an entirety, and that no lien could be sustained until it was all performed. In its opinion the Court say (*inter alias*): "If plaintiffs were prevented from completing their contract by the defendants, they were fully justified in abandoning it, and had then a right to be paid a fair compensation for the work they had performed. Disregarding all those parts of the complaint which look to a foreclosure of the lien, we do not perceive wherein it fails to state all the facts necessary for a recovery against McLaughlin."

This is reported in 47 Cal., p. 86. The Supreme Court having thus held the complaint good as stating a cause of action against defendant McLaughlin; the case came a third time for trial before the District Court upon an answer made by McLaughlin, which resulted in a personal judgment against McLaughlin for \$268,655.52 and \$502.50 costs.

From this judgment defendant McLaughlin again appealed, and at the January Term, 1878, upon the facts of the case as then shown, the Court held, that the failure to pay an installment on the contract when it became due did not amount to a prevention, and that upon such failure the contractor could not abandon the work and sue for all the benefits which he would have received upon a full performance.

The Court in its opinion concede that the plaintiff has, or at least may have, a cause of action, and allow the Court below to amend the complaint by an averment of the actual value of the work done, and seem to concede that so much at least, upon such amendments, the plaintiff would be entitled to recover.

The Court again reiterate that the contract is an entirety, and that upon the facts before it, and the findings, "it does not appear that the defendant knew, *at the time the contract was entered into*, that plaintiffs relied entirely on his payments to them; or that such a reliance was an inducement to the contract on their part."

This is saying if it had appeared that defendant did know, at the time the contract was entered into, that the plaintiff relied entirely on such payments, and that that was an inducement to the contract, then a failure to make the payments would be such a violation of the contract as to amount to a prevention.

This language can admit of no other construction.

But in this trial it was proved, by the evidence of both plaintiff and defendant, that the defendant *did* know, *at the time the contract was entered into*, that plaintiffs relied entirely on his payments to them.

Thus the plaintiff Cox, in answer to question propounded by the Court, answers as follows:

"The Court—You may state now, Captain Cox, what the means of yourself and Arnold and Myers were when the contract was first made, and what they continued to be while you were at work—what your means of carrying on the work and paying your laborers were?

"A. Comparatively nothing to the amount of work. We had a small amount of means. Well, we had so little means that they were compelled to go our security for the work and labor done, as he testified here. We didn't have the means, and they had to see it was paid; but they knew that we didn't have the means. * * *

"The Court—Then what you mean to say is, that without the punctual payment of those estimates, as they were made, you could not proceed with the work?

"A. We could not, and they knew it.

"Q. Mr. McLaughlin knew that?

"A. Yes, sir. B. F. Mann, his attorney, knew it.

"Mr. Wise—You say B. F. Mann, his attorney, knew it?

"A. Yes, sir.

"Mr. Bergin—How do you know that?

"A. Because I told him so, and he had to go our security."

And defendant McLaughlin answered as follows:

"Q. When you went into the contract what were the means of any of you? What were the means of Cox, Arnold and Myers for carrying on the work? Were they capitalists? Had they

money, or were they dependent on the money that should come from the work itself?

"A. Well, I didn't know Mr. Cox or Myers at that time; he was a contractor and was not here. It was supposed they had means. Mr. Cox represented means; Mr. Arnold, Mr. Myers I don't think represented any means to me, but it was supposed that Mr. Cox had means. They were well aware, Judge, that it was very difficult for me, or any of us, to obtain the amount of money to go on and build a railroad under those circumstances. We had to make the very best use possible of all the money that could be obtained.

"Q. Your means for going on with the work arose from those public benefactions and appropriations in the shape of bonds and subsidies?

"A. Yes.

"Q. Mainly from that?

"A. Yes, and other things. I had some means of my own.

"Q. And the means of the contractors for employing a large force of men would necessarily depend on the payments made on the estimates?

"A. Yes; and for that reason *it was so understood in the making of the contract* that they were not to go on, and increase their force beyond where they could see they would get their pay," etc.

This concurrent evidence of both plaintiff and defendant, satisfies me "that defendant knew at the time the contract was entered into that plaintiff did rely entirely on his payments to them, and that such reliance was an inducement to the contract on their part;" and so from this evidence above quoted, and from other evidence and circumstances proved, I shall find the fact so to be.

This fact was neither proved nor found upon the last trial. Had it been so found, we are bound to believe that the judgment would not have been reversed, because then the conditions and stipulations of the contract would have been interpreted and held to be dependent, the breach of any material one of which would have entitled either party, as against the other, to sustain an action for the breach; or, in this case, would have entitled the plaintiff to abandon the work, and sue upon the contract and recover for the agreed price of the work done and materials furnished, as well as for damages in respect to what could have been made, had the defendant kept the contract on his part.

Nor is the evidence now given upon this subject amenable to the objection that it is *adding to the terms or conditions* of the contract by verbal or parole evidence.

It is always permissible to show the facts, conditions, and circumstances surrounding the parties at the time a contract is made, with a view to its interpretation and meaning.

This rule is thus laid down in 1 Greenleaf Ev., Sec. 287:

"Indeed there is no material *difference* of principle in the

rules of interpretation between *wills and contracts*, except what naturally arises from the different circumstances of the parties. The object in both cases is the same—namely, to discover the intention. And to do this, the Court may in either case *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject matter.

“With this view, evidence must be admissible of all the circumstances surrounding the author or the instrument. In the simplest case that can be put—namely, that of an instrument appearing on the face of it to be perfectly intelligible—inquiry must be made for a subject matter to satisfy the description,” etc.

This principle has received the sanction of the Supreme Court of this State in numerous cases.

Thus in *McNeil et al. vs. Shirley et al.*, 33 Cal. 202, it was held that, in construing written instruments, the circumstances under which they were written and the subsequent conduct of the parties might be consulted.

It will be observed that there is nothing in the letter or language of the contract under consideration, which directly and in so many words makes the continuance of the work dependent on the payments of the estimates, nor is there any language to the contrary of this. On this subject the contract, so far as words are concerned, is silent.

But the contract does provide (in substance) for at least monthly estimates as the work progresses (see contract), and in substance, the contract provides for the payment of these estimates to plaintiff when made, from the bonds and subsidies received by the railroad company and McLaughlin.

The bonds and subsidies were in fact received by the company, and by defendant, and that cannot be alleged as a reason for the non-payment of the estimates.

The plaintiff was then, upon the performance of each month's work, entitled to his pay according to the estimates as for a part performance of the this entire contract.

In *Saunders vs. Clark*, 20 Cal. 300, it was held that when any doubt exists as to the true meaning of a written contract, the conditions and motives of the contracting parties, as shown by its recitals, or by outside evidence, must be looked into to ascertain what was the real intention of the parties, which, when ascertained must prevail over the literal sense.

The Court (Sanderson, C. J.) say: “When any doubt exists as to the true meaning of a written instrument, it must all be read together and in the light of surrounding circumstances. We must consult the conditions and motives of the contracting parties as developed either in the recitals in the instrument, if such there be, or by outside matters resting in evidence, for the purpose of ascertaining what was the real intention of the parties, which, when accurately ascertained, must always prevail over the literal sense of the terms” (citing *People vs. The Utica Insurance*

Company, 15 J. R. 380, and *Whitney vs. Whitney*, 14 Mass. 92).

The case referred to in 15 Johnson arose upon the construction of a statute (the same reasons being applicable to a contract), and the Court (Thompson C. J.) say: "Such construction ought to be put upon a statute as may best answer the intention the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances, and whenever such intention can be discovered it ought to be followed with reason and discretion in the construction of the statute, although such construction may seem contrary to the letter of the statute. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers."

In *Wilson vs. Troup*, 2 Cowen, 195, it was held that, in the construction of all contracts, the *situation of the parties*, and the subject matter of the contract are to be considered in order to determine the meaning of any particular provision.

The case referred to was in brief this: The owner of a tract of land had executed to his agent a power of attorney authorizing him to mortgage the land. The power did not authorize the insertion in the mortgage of a power of sale in case of default, but such power of sale was nevertheless inserted by the attorney, under which a sale of the mortgaged premises was made, and for this reason it was insisted that the title under the sale made in pursuance of the power was void. The Court held that the attorney had the right, although not expressly authorized by his letter of attorney, to make this insertion in the mortgage.

Savage, C. J., p. 241, says: "Although the instrument without that power of sale would still be a mortgage, yet the fair and common acceptance of the term *mortgage* undoubtedly is the instrument as usually drawn, and in common use as a mortgage where the power of Faulker was to be exercised."

These principles have in this State been crystalized into a statute.

Section 1860, Code of Civil Procedure, provides that "for the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

The Supreme Court of this State had in effect established the same rule by a series of decisions. (See *Brannan vs. Kessick*, 10 Cal. 95; *Jenny Lind Co. vs. Bower*, 11 Id. 194; *Stanley vs. Green*, 12 Id. 148; *Pierce vs. Robinson*, 13 Id. 116; *Brewster vs. Lathrop*, 15 Id. 21; *Hancock vs. Watson*, 18 Id. 137; *Richardson*

vs. Scott Riem Co., 22 Id. 150; Colton vs. Leary, Id. 496; Ver Zan vs. McGregor, 23 Id. 339; Kimbel vs. Semple, 25 Id. 440; Bergen vs. O'Reiley, 32 Id. 11.)

It cannot be necessary to pursue this subject. The law must be held to be that such interpretation and construction must be placed upon contracts, as will effectuate the intention of the parties, and that for the purpose of ascertaining such intention, where the contract (*as in this case*) is silent upon the subject, or where its letter may admit of a construction contrary to the real intention of the parties, *resort may be had to the surrounding circumstances under which the instrument was made and to the subject matter and the situation of the parties.*

In other words, "when the terms of the promise" (viewed in the light of the surrounding circumstances, situation of the parties, and subject matter), "admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it." This is the rule as stated by the New York Code Commissioners, and Paley, in *Moral Philosophy*, pp. 85-97, says: "that whatever is expected on one side, and known to be expected by the other, is to be deemed a part of the condition of the contract." Sec. 1864 of our Code of Civil Procedure provides that "when the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it; and when different constructions are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

Now how did McLaughlin suppose that Cox & Co. understood the provision of the contract as to the punctual payment of the monthly estimates? Did he not suppose that they understood such payments to be a condition to their obligation to go on with the work? He certainly did know that their ability to proceed with the work depended on this. This he in substance states in his testimony above quoted, and such also is the testimony of Cox. McLaughlin knew that Cox & Co. relied on the estimates entirely, and that they had substantially no capital. Defendant knew, therefore, that the inevitable consequence which must, and would follow the non-payment of the estimate, would be the stopping of the work. Is it not a fair construction and interpretation of the contract under this state of facts, that the progress and competition of the work should be held dependent on the payments being punctually made? And should not the defendant be held as "supposing" that Cox & Co. so "*understood it.*" And if defendant did suppose that such was the understanding of Cox & Co. at the time the contract was entered into, does it not necessarily follow that such understanding of plaintiffs became a part of the contract, and made the condition of continuing the work dependent on the payments, and that,

therefore, in this respect the conditions of the contract were dependent, mutual and concurrent? This is adding nothing to the contract. It is simply reading it in the light of its surroundings for the purpose of its interpretation. It rarely happens (almost never) that a contract upon its face, and in its words and language, declares and states that the covenants and agreements are to be construed and held as dependent and concurrent. Whether this be so is almost always a matter of construction or interpretation to be ascertained from the language used, and the circumstances and condition of the parties at the time it was made taken in connection with its subject matter.

Upon this subject I quote from Parsons on Contracts, Vol. 2, Sec. 525:

"But stipulations or agreements may be implied, upon the 'breach of which an action may be brought. Mutual contracts sometimes contain a condition, the breach of which by one party permits the other to throw the contract up, and consider it as altogether null.

"Whether a provision shall have this effect, for which purpose it must be construed as an absolute condition, is sometimes a question of extreme difficulty. *It is quite certain, however, that no precise words are now requisite to constitute a condition, and that perhaps no formal words will constitute a condition, if it be obvious from the whole instrument that this was not the intention or understanding of the parties.*" * * *

And from part of Sec. 499, same Vol.: "So, too, the situation of the parties at the time of the contract, and of the property which is the subject-matter of the contract, will often be of great service in guiding the construction, because, as has been said, this intention will be carried into effect, so far as the rules of language and the rules of law will permit.

"So the moral rule above referred to may be applicable, because a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties. In *Skuyllkill Nav. Co. vs. Moore*, 2 What. 491, Gibson, Ch. J., in reference to the contract then under consideration, says: 'The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus attained is exactly what is obtained from the cardinal rule of intention.'

Tested by this rule, it admits of hardly a doubt but the obligation to do the work is dependent upon the agreed payments being punctually paid.

Should the mass of mankind (or a mass meeting) have this contract presented to them with the proofs before alluded to, showing that Cox & Co. were without capital when they entered into it, that the defendant knew this fact, and if defendant should

come before them and repeat his testimony above given, to the effect that the doing of the work would necessarily depend on the punctual payment of the estimates, and were asked to say whether the doing of the work, etc., was conditional upon the payments being made, could there be but one answer? Would there be likely to be a dissenting voice amongst the mass upon the subject? The day of "bricks without straw" amongst enlightened communitites has gone by.

When a contracting party knows that the other party to the contract cannot possibly fulfill the agreement, but must stop the work unless he keeps his agreement, and when further he knew this when the contract was made, is it not fair to hold that his failure to pay (necessarily stopping the work), is a prevention?

If a person does, or omits to do, a thing which of necessity produces and must produce a given result, is it not logical to hold him responsible for the result thus produced? In this connection I refer to the case of *Hale vs. Traut*, 35 Cal. 241, which was an action on a contract to manufacture a large quantity of lumber (about 80,000 feet per month), *to be paid for in monthly installments*, as the lumber was made and delivered, and defendant refused to pay a monthly installment as it became due, declared the contract at an end, and that he would receive no more lumber under it. In that case, as in this, the defendant argued for the entirety of the contract, and that plaintiff should go on sawing lumber at the rate of 80,000 feet per month until he had completed the contract on his part, and that until he had done this he could not sustain an action.

But Judge Sawyer, who wrote the opinion in that case, seems to be of the opinion that the failure to make the monthly payment was a breach of the contract. Upon this subject he says (pp. 241-2):

"It would require a large amount of capital for plaintiffs to proceed in the manufacture of lumber, for a period of three years, without receiving payments. * * * There was not merely a neglect of payment, but they were notified by defendants that they should consider the contract as at an end, and would receive no more lumber under it.

"Defendants thereby (*i. e.*, by the act of refusing payment and of refusing to receive any more lumber) *prevented the plaintiffs from fulfilling their contract.*"

It is true that the case referred to shows not only a refusal to make the monthly payment, and also a declaration that the defendant considered the contract as at an end, etc., but yet it is clearly inferable from his language, that the Judge considered that the omission or refusal to make the monthly payment was a material element, and would, or at least might, amount to prevention; and it is not too much to say that he most probably would have done so, had evidence in the case shown that the lumber manufacturers were without capital—that they relied en-

tiely upon the monthly payments to meet their necessary expenses for labor and material in doing the work, and that defendants knew this when the contract was made, and especially if defendants should in open Court, as a witness confirm all this by stating that they knew that upon the payments being punctually made depended the ability of plaintiffs to go on with his work of manufacturing the lumber. Sec. 1647 Civil Code provides that: "A contract may be explained by reference to the circumstances under which it was made." The question we are now considering is one of *intention*, gathered from the words or language of the contract, and the surrounding circumstances existing at the time it was made. Referring to the contract itself (made January 7, 1865), the very first clause would seem to make the performance of the work dependent upon the payments being made as in the contract provided.

Its language is: "The said parties of the first part" (Cox, Arnold & Myers) "*in consideration of the covenants, promises and agreements hereinafter contained on the part and behalf of said party of the second part*" (McLaughlin) "to be kept, done and performed, doth covenant, promise and agree to and with the said party of the second part" (McLaughlin), "his heirs and assigns in the manner and form following, that is to say;" and then follows the contract by Cox & Arnold to do the work in the manner specified, and the contract by McLaughlin to pay as the work progressed, on monthly estimates.

That is to say, Cox *et al.* promised to do the work upon punctual payments being made as it progressed, as provided for in the contract. Taking the clause above quoted in connection with the fact that Cox and his partners were, at the time of the contract was made, substantially without capital; that they relied entirely upon the punctual payment of the monthly estimates to go on with the work; that McLaughlin (through Mann, his agent) knew this, and that McLaughlin himself, as a witness on this trial, states in substance that the ability of Cox & Co. to go on with the work would depend on such payments—is it not a reasonable interpretation to say that the obligation to do the work is dependent on payments being made as agreed?

Did McLaughlin suppose or believe that Cox & Co. so understood it? Did he not believe that they did understand that the doing of the work was conditional on the payments being made as agreed?

The provision allowing him (McLaughlin) to stop work for a limited time, or to reduce the force on the work, appears to have been made to enable him to keep up his payments, so that the cost of the work should not exceed his means of meeting it; and that thus he recognized the obligation to pay, as being the condition on which the work was to go on.

In his testimony given on this trial he states, as above quoted, viz.: That the means of the contractors for employing a large

force of men would necessarily depend on the payments made on the estimates, "and for that reason *it was so understood in the making of the contract* that they were not to go on and increase their force beyond where they could see they would get their pay."

Is this not saying that the obligation to do the work depended on the payments being made, and that Cox & Co. should not go on without, or beyond the means of McLaughlin to pay. The language of the contract above quoted may fairly be held to import this. The surrounding circumstances, and the acts of McLaughlin under it, confirm this as a reasonable construction.

In the case of Philips & Colby Construction Company vs. Seymour, 91 U. S., 1 Otto, 646, which involved a contract for the construction of railroad work, and in which, as in this case, the work was to be paid for on monthly estimates—and where the contractors, failing to get their pay as agreed (as in this case), quit the work and sued on the contract, the Court say, p. 649:

"Plaintiffs here had already performed, and defendant failed to do its corresponding duty under the contract; and defendant having defaulted on a payment due plaintiffs, are not required to go on at the hazard of further loss."

And see p. 653: "If by defendant's breach plaintiffs were justified in abandoning the work, then they were entitled to all they had earned under that contract, including the \$15,000, because the \$30,000, of which this \$15,000 was a part, was a liquidated sum agreed upon as a compensation for extra work on the first forty miles of the road which had been completed, and was only withheld like the fifteen per cent. as security for the future performance by plaintiffs."

"Defendant having by his default terminated the work, had no longer any right to retain either of these sums."

In the case of the Grand Rapids and Bay City R. R. Co. vs. Stewart & Van Duren, 29 Mich. 431, the contractors sued for work done under their contract, having quitted the work because the monthly estimates had not been paid them, and in so far the case is parallel with this. A copy of the contract accompanies the report of the case, and upon examination it appears that no express provision is made that they might quit the work if the payments were not made.

And yet the Court without (as in this case) the proof of the "surrounding circumstances," etc., upon the face of the contract, construes it to mean that the obligation to do the work was dependent upon the payments, and held (syllabus):

"Continued and repeated defaults in payments according to the provisions of the contract, are held to have justified the contractors in abandoning the work before the completion, and to entitle them to recover as damages what the uncompleted portion of the work would amount to at the contract price, beyond the cost of completing it."

In this case Cox only seeks to recover for the actual value of the work done by him, and not for what he could have made had he gone on and completed the work.

The defendant's counsel refer to a case from the Supreme Court of Illinois, sustaining, as they claim, the position contended for by them, viz., that the contract being an entirety, Cox can sustain no action for the work done until he has fully performed, unless prevented from performing by defendant, and that the non-payment of the money for the work when due was not prevention, and did not justify them in quitting the work. The case is that of *Palm & Robinson vs. The Ohio and Mississippi R. R. Co.*, 18 Ill. 217.

In this case the plaintiffs sued upon a contract with defendants to construct and deliver to them sixteen locomotives, to be paid for as delivered. The fifth locomotive delivered was not paid for: held that on this account the plaintiffs could not abandon the contract, and recover for loss of profits on the eleven to be delivered and the material for them on hand, unless the payment on delivery was expressly made a condition precedent to the completion of the contract.

"To enable the plaintiffs to recover *such damages* the non-performance by defendant must be of such a nature as to absolutely prohibit plaintiff from fulfilling his part of the contract." (I have condensed the statement of the case from the syllabus.)

The full report of the case shows that the plaintiffs did recover a verdict and judgment for \$10,486.28, which must have been for the value of the locomotive delivered and not paid for, and the plaintiffs, not satisfied with their verdict, but insisting on damages for what they could have made, in not being allowed to go on and complete the remaining eleven engines, took their case to the Supreme Court, and the Court *affirmed* the judgment, thus holding that they had the right to recover for the work actually done, and of which the defendants had the benefit. This is all the plaintiffs seek in this case.

It is true the Court hold the contract to be an entirety, and that non-payment as the work progressed was not prevention so as to justify plaintiffs' abandonment of the contract, and sustain an action for the profits they could have made if allowed to go on with the contract.

The contract in this case is not set out except by way of recital in the declaration, and we therefore cannot say whether, as in this case, it contained a COVENANT TO DO THE WORK UPON THE DEFENDANTS keeping their COVENANT TO PAY. But from the meagre report of the case, it is plainly inferable that it contained no such condition, and no proof was made *dehors* showing the circumstances existing when the contract was made.

It was not shown that plaintiffs were then without capital, and dependent upon the payments to enable them to go on with the work, and that defendants knew this and had acted upon it.

In short, this decision was made upon the contract, in that case, which, in the respects before pointed out, does not conform to or resemble the contract under consideration. It is authority only to the point, that under *it* non-payment was not prevention. It does not hold or decide that where a contract (as in this case) is so worded as, upon a fair construction, to make the obligation to do the work dependent upon the payment of the installments, and that proof *dehors* confirmed this construction—that non-payment in such a case would not be a breach for which a party might abandon the work.

But the Supreme Court of Illinois in a railroad contract case viz.: *Doblins vs. Higgins*, 68 Ill. 440, decide this principle, viz.: where by the terms of a contract parties performing labor "under it are to be paid at the end of each month for the labor performed to that time, and they are not paid at the stipulated time, and are by reason thereof compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for *pro tanto* at the contract price." (Syllabus.)

Although the Court in this case does not decide that failure to pay is prevention, this question not being made, yet they do hold such failure to be a sufficient cause of abandonment of the contract by the contractor.

I have carefully examined the various decisions of the Supreme Court in this case, and cannot see that the law of the case is in any way contravened by the views here expressed.

"The law of the case" can only be invoked where on a subsequent appeal the same state of facts as appear as existed at the time of the former decision.

If, upon a new trial, other and new facts are made to appear by which a different construction or interpretation of a contract is proper, than a new case in so far is made to which a former decision can have no application.

I conclude, therefore, upon the case as now made that failure to pay the estimates was prevention; and further, that whether a technical prevention or not, it was such a violation of the contract on the part of defendant as would justify him in abandoning the work, and that in either case an action would lie upon the contract (which for the purpose of the action may be considered in force) for all the work done under it.

This being so, no *quantum meruit* count is necessary.

I am also of the opinion that defendant violated the supplemental contract the next day after it was made, by ordering a suspension of all the work except the bridges and masonry, and on October 13, 1865, in ordering all but eight or ten men to cease work.

It is true that he had the right under the contract to reduce the force of labor employed on the work, but it was not a reasonable exercise of this power, in view of the magnitude of the work, and the time limited to complete it to reduce the force from 275 to 10. For all the purposes of going on with the work it

must be regarded as suspended by this act of defendant. Defendant seems himself to have understood it as a suspension of the work, as may be seen by referring to his answers as a witness; and I shall find as a fact that on the third day of October, 1865, the very next day after the supplemental contract was made, that McLaughlin suspended the work; and this was again done on October 13, 1865.

From this time, Cox & Co. had the right to profile estimates. It follows that defendant having done this, an action lays on the contract in favor of plaintiff to recover on the profile estimates, as well as for prevention in not paying the estimates as above stated.

This being so, the *quantum meruit* count becomes unnecessary, and may be treated as surplusage. But if this were otherwise—if a *quantum meruit* allegation were necessary, I should hold that the Statute of Limitations can form no defense.

No new cause of action has been introduced; all the facts upon which plaintiffs seek a recovery were set forth in the complaint when filed in 1868. The contract, the work done under it, its price and the amount due and unpaid are all stated, and now a simple averment of the worth of the work is made.

But suppose there had been no act or omission on the part of defendant amounting to or in law constituting prevention, that the non-payment of the monthly estimates was not, under all the circumstances surrounding the making of this contract, as now proved such an act as in contemplation of the parties at the time as would necessarily prevent Cox & Co. from going on with their work, suppose that defendant's act in reducing the force of men to ten was reasonable, and did not amount to a suspension, the fact still remains, that defendant has had, accepted and utilized the work and material actually done and furnished by Cox & Co.; and I understand the law to be that defendant is liable on a *quantum meruit* for the actual value thereof, subject to just deduction for any damages which defendant may have sustained for the failure of plaintiffs to do all the contract called for.

The case of *Loneax vs. Bailey*, 7 Blackford, 599, is an instructive authority in support of this position. The substance of the facts, as shown by the pleadings, is that plaintiffs contracted with defendant to manufacture 100 winnowing machines on a specified plan, and that he had actually made and delivered to defendants 50 of them, but not according to the specifications of the contract.

The defendant, however, took and accepted the 50. The Court held that the contract was an entirety, and that so long as plaintiff had not fulfilled it all on his part, he could sustain no action upon it. (The question of prevention did not arise in this case, although the complaint avers that defendant failed to furnish material, etc. Yet the answer denies this, and the ques-

tion arose upon a demurrer to this plea, whereby it stood admitted that plaintiff did furnish the materials, etc.)

The Court hold, that although no action would lie on the contract, because it had not been fully performed by plaintiff, yet, "that when one party to a special entire contract, has not complied with its terms, but professing to act under it, has done for, or delivered to the other party something of value to him, which he has accepted, no action will lie on the contract for the work done or thing delivered; but that the party who has been thus benefited by the labor, or property, of the other shall be responsible on the implied promise, arising from the circumstances, to the extent of the value received by him."

And the Court cite a number of English and American authorities sustaining this position. *Linningsdale vs. Livingstone*, 10 J. R., one of the authorities referred to in the case above cited from 7th of Blackf., was an action of assumpsit for the value of 130 logs delivered to defendant, and he recovered judgment at the rate of \$2.50 per log and interest.

On the motion for a new trial, it appeared that there was a special contract, which not only called for the delivery of the logs, but a delivery within a specified time, which plaintiff did not fulfill, and that he should bore, and lay them, for which he was to have \$75. This part of the contract plaintiff did not fulfill.

The Court say: "In this case the plaintiff never could recover for the logs delivered, and which went to the defendant's use, except upon the general counts; for the agreement was not carried fully into effect by him, and the performance had become impossible by the act of defendant," etc.

(In this case the facts show that the defendant had laid fifteen or twenty of the logs into a dock, and, of course, they could not be bored and laid. This is the act of defendant referred to.)

The Court sustained the recovery, and denied the motion for a new trial. It can scarcely be necessary to pursue this subject.

In the last report of this case, 52 Cal. 594, the Court seem to concede that plaintiff can recover on a *quantum meruit* for the actual value of the work done, of which defendant has had the benefit.

This brings us to the question as to whether anything is due from defendant to plaintiff on account of "the actual value of the work done."

The plaintiff claims there is a very large amount due him, while the defendant claims that he has been paid in full, and overpaid, including the reserved 10 per cent. and all.

To this question, therefore, we will now direct our attention.

What was the actual value of the work done by Cox & Co., for which they have not been paid?

The contract price has been received in evidence, and also that of plaintiff and other evidence, showing that the prices as named

in the contract were the fair value of the work, and such I shall find the fact to be.

It follows, therefore, that whether a recovery be sustained upon the contract itself, or aside from the contract, the value of the work done under it (and of which defendant has had the full benefit and advantage), that the result must be the same.

I have carefully examined the evidence upon this subject, and have considered the briefs and arguments of counsel in relation thereto, and without here going over and reviewing the evidence at length upon this subject, I find that the work actually done by Cox & Co., and material furnished, and the contract price, and actual value thereof, the payments made thereon, and the balance actually due and unpaid, on September, 1866, to be as follows:

316,646 cubic yards of embankment, at 17.6-10.....	\$55,729 68
66,785 " " earth excavation, at 17.6-10.....	11,754 16
86,276 " " rock excavation, at \$1.10.....	94,903 60
9,867 " " masonry, at \$7.75.....	76,469 25
1,966 lineal feet How truss bridges, at \$36.....	70,776 00
115 " " small truss bridges, at \$15.50.....	1,782 50
550 " " trestle work, at \$9.40.....	5,170 00
600 " " tunnel, at \$50.....	30,000 00
75 cattle guards, at \$300.....	22,500 00
Changing roads.....	2,000 00

Total.....\$371,085 19

Above I have allowed for cattle guards and changing roads. These are not on the profile, but are in the schedule attached to the contract, which go to make up the total amount of \$900,000, for which the work was to be done.

In the above calculation is included the entire profile estimate of the 21st mile of the road. But the 21st mile was only partly completed, and a deduction must be made for the part not completed on the necessary cost of finishing this 21st mile. The profile estimate of the whole of the 21st mile, as carried into the calculation above made, is \$50,561.47. Of this Arnold states that about two-thirds had been done, and that he made this calculation, not by actual measurement, but from an examination of the ground with some care, and from his skill as an engineer. (Printed transcript, p. 208.) Afterwards he refreshes his memory by reference to a paper (which I infer was an estimate made by himself), and corrects himself by stating that four-fifths of the work had been done on the 21st mile.

As no actual measurement of this work was made, and all rested upon the *guess* of the witness and that witness a party in interest, I am disposed to take his first statement as nearer correct, and allow that one-third of the work on the twenty-first mile remained to be done. One-third of \$50,561.47 is \$16,853.82, which deducted from above total of \$371,085.19 leaves \$354,-

231.37, and from this latter sum must be deducted \$188,690.07 the sum total of all payments made, leaving \$165,541.30 the balance actually due, upon which plaintiff is entitled to interest at the legal rate as from time to time fixed by statute, net ten per cent. per annum, from September 15, 1866, to March 30, 1868; seven per cent. from March 30, 1868, to date of the judgment herein.

In arriving at my conclusion as to the amount and value of work done and materials furnished, I have taken the profile estimates, and laid the testimony of the engineer Stangroom, as to the estimates made by him entirely aside, for the reason that his estimates did not only not follow or profess to follow the profile, but professed to state the work actually done, and even to this extent were not made except in part, (and what part does not appear) from actual measurements, but from notes, memoranda, and loose papers in the office of McLaughlin, that he says it would be hard to make head or tail of.

I think that the plaintiff is entitled to the profile estimates for two reasons: first, because the supplemental contract so provided in case defendant entirely suspended the work, which as we find he did do; and second, because the profile estimates as shown by the evidence, and as I shall find, represents the real and fair value of the work. The evidence shows that four-ninths of the \$900,000 job had been done, which would make \$400,000, and would exceed the profile estimates about \$29,000.

As some evidence of the real value of the work, the contract of defendant with the W. P. R. Co. (under which Cox & Co. were sub-contractors), provide that McLaughlin should have for doing this same work (which Cox & Co. undertook for \$900,000.00) the sum of \$2,158,100, or \$1,158,100, over what Cox & Co. agreed to do the same work for. McLaughlin testifies that his contract with the railroad company was a fair one. This work done by Cox & Co. was all utilized and used finally by the railroad company, McLaughlin having sold out to C. P., and presumably made the work done available as so much done on his contract.

The technical objections made to the complaint having been decided upon demurrer, I do not feel called upon to discuss, and will only say that I hold that the complaint does state sufficient facts to constitute a cause of action, and that the *evidence* of the ultimate facts stated in it is properly omitted. I think the Supreme Court have held this complaint good in the respects criticised.

Upon the findings being settled and made, judgment will be entered and rendered for the amount above stated.

December 3, 1880.

A. M. CRANE,
Judge of Superior Court.

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No. 2.

Supreme Court of California.

IN BANK.

[Filed January 29, 1881.]

No. 10,575.

EX PARTE THOMAS K. FOLEY ON HABEAS CORPUS.

CRIMINAL LAW—SUFFICIENCY OF COMPLAINT FOR USING VULGAR LANGUAGE IN PRESENCE OF CHILDREN. Where a person convicted of misdemeanor on a complaint which charged that accused, on a certain day and in a certain town, "did use vulgar and indecent language within the hearing of children, in a loud and boisterous manner, willfully and unlawfully," sued out a habeas corpus, and objected that the judgment was void because the complaint did not recite the language used, and because the offense charged could, under Section 415 of the Penal Code, only be committed "on the public street of an unincorporated town:" *Held*, that neither objection was valid.

COMPLAINT FOR MISDEMEANOR—CHARGING OFFENSE IN WORDS OF THE STATUTE. A complaint for misdemeanor which distinctly charges an offense, describing it in the words of the statute, is ordinarily sufficient.

COMPLAINT FOR USING VULGAR LANGUAGE—NOT INDISPENSABLE TO RECITE WORDS USED. If a complaint charging a misdemeanor in the use of profane and obscene language, omits to recite the language used, an objection for such omission shall be specially taken, but the failure to recite the words will not render a judgment on such a complaint void.

SECTION 415 OF PENAL CODE—USE OF VULGAR LANGUAGE IN PRESENCE OF WOMEN OR CHILDREN ANYWHERE A MISDEMEANOR. Section 415 of the Penal Code enumerates several different acts, some of which are misdemeanors if done in an unincorporated town, and the rest, if done anywhere; and among the latter is the use of vulgar, profane or indecent language, within the presence or hearing of women or children, in a loud and boisterous manner.

Julius Lee and J. M. Lesser, for petitioner.

MCKINSTRY, J., delivered the opinion of the Court:

The petitioner was brought before the Court in bank, upon *habeas corpus*, and after hearing was remanded to custody. He prayed to be discharged on the ground that the judgment

under which he was held was invalid,* for the reason that the complaint on which he was tried charged no offense.

The complaint charges that "defendant (petitioner), on the nineteenth day of October, 1880, at Watsonville, in the county of Santa Cruz, State of California, committed a misdemeanor as follows, to wit: The said T. K. Foley at the time and place aforesaid, did use vulgar and indecent language within the hearing of children, in a loud and boisterous manner, willfully and unlawfully, all of which is contrary to the form of the statute," etc.

Section 415 of the Penal Code is as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

It was urged at the argument that the judgment was void because the language, alleged to be profane and obscene, was not recited in the complaint. It was also urged that the *locus* is a material element in the offense created by the statute—that the offense which the complaint attempts to charge can only be committed on the public streets of an "unincorporated town." Counsel for petitioner relied on *Ex parte Kearney* as authority for both these positions.

In *Ex parte Kearney* this Court (after suggesting objections to the validity of a certain ordinance) held that the petitioner was entitled to his discharge because it affirmatively appeared upon the record of the Police Court that he had been tried, and sentenced to be imprisoned for doing an act which was neither a violation of the ordinance, nor of any law or statute of the State. He was not tried for a violation of an ordinance prohibiting the use of bawdy, lewd, obscene or profane words. That charge had been made against him, but it was expressly dismissed in the Police Court. He was tried for having violated an ordinance which made it a misdemeanor for one to "address to another, or utter in the

presence of another, words, language, or expressions having a tendency to create a breach of the peace." The complaint not only failed to show that the person was present of whom the words were spoken, or that they were addressed to him, but showed affirmatively that the words were not addressed to such person and that he was not present. No like objection can be made to the complaint on which the present petitioner was tried and convicted. An offense is distinctly charged in the complaint, and is described in the language of the statute—which is ordinarily sufficient. (1 Bish. Cr. Prac. 359, and cases cited.) Even if it should be admitted—and we do not admit it—that it would have been better pleading to have recited the words, the objection to the omission should have been specially taken, and the failure to recite the words did not render the judgment void.

But we do not understand Section 415 of the Penal Code to provide for the punishment of "vulgar, profane or indecent language, within the presence or hearing of women or children, in a loud and boisterous manner" only where such language is thus used "on the streets of an unincorporated town."

The statute enumerates several different acts, some of which are declared to be misdemeanors if done in an unincorporated town, and the rest of which are made misdemeanors if done anywhere. Each of the acts made a misdemeanor in case only it is committed within an unincorporated town, is specifically declared to be a misdemeanor if done in such town. Thus— * * * "Or who, on the public streets of any unincorporated town, or upon the public highways of such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town." The other offenses defined in the section are not directly connected with the words "unincorporated town," and the definition of such other offense is complete without the element of locality. The purpose of the statute is made still more apparent by the very nature of the acts prohibited in a "town," or (the sense in which the word is used in the statute) collection of dwellings such as constitutes a village (unincorporated). There seems sufficient reason why a horse race "for amusement," or the firing of a gun or pistol, should be made a criminal offense in such an assemblage of houses and inhabitants, while, in the absence of unmistakable language to that effect, it will not be presumed that it was the intention of the Legislature to subject a citizen who shall discharge a fire arm anywhere within the borders of the State to imprisonment

in the county jail for "firing a gun." The same section very wisely, however, makes it a violation of the criminal law "to fight" or "to use vulgar, profane or indecent language in the presence of women and children, in a loud and boisterous manner," within and without a "town."

We concur: Ross, J., Morrison, C. J., Thornton, J., Sharpstein, J.

I concur in the judgment: Myrick, J.

DEPARTMENT No. 1.

[Filed January 26, 1881.]

No. 7328.

W. H. BRODRIBB, BY HIS GUARDIAN, H. GOODALL,

RESPONDENT,

VS.

EDWARD BRODRIBB, J. P. GREVES AND GEORGE
LEACH, APPELLANTS.

ACTION ON GUARDIAN'S BOND—ATTEMPT TO RE-OPEN SETTLEMENT OF ACCOUNT BY PROBATE COURT—INSUFFICIENCY OF SHOWING. Where the guardian of an insane person, upon being removed by a Probate Court, filed his accounts, showing him indebted to his ward, and the accounts were duly settled by the Court, and decree rendered for such indebtedness; and afterwards, in an action against such guardian and the sureties on his official bond for the amount so found due, they set up by way of defense and cross-complaint, that the guardian, soon after his appointment, became so weak and unsound in mind that he was incompetent to attend to any business whatever; that he was in that condition when his accounts were filed; that the accounts were unjust and incorrect, and, as settled and allowed, were "false and untrue in many particulars," and praying that the judgment of the Probate Court might be set aside, and the accounts opened for final settlement: *Held*, that such cross-complaint did not state facts sufficient to entitle defendants to relief, and that it was no error to sustain a demurrer thereto, and to exclude evidence offered by defendants to sustain their defense.

Appeal from the Superior Court of San Bernardino County.

E. D. Strong and Paris & Allen, for appellant.

Byron Waters, for respondent.

McKEE, J., delivered the following opinion:

The Probate Court of San Bernardino County revoked letters of guardianship which had been issued to the defendant, Edward Brodribb, as guardian of the person and estate of W. H. Brodribb, a person who had been adjudged insane, and ordered him to render a full, true and final account of

his guardianship. In obedience to the order, the guardian presented his final account, and the same was settled and allowed by the Court. Upon the settlement there was found due to the estate of the ward, a balance, which the defendant, Edward, failed and refused to pay to the plaintiff, and this action was brought upon his official bond to recover the amount.

To the complaint in the action the defendant Edward answered, by way of defense and cross-complaint, that at the time he presented the final account and report of his guardianship, he was in such a condition, physically and mentally, as rendered him legally incompetent to make and render an account of his trust and to transact any business, and the account itself is "false and untrue." Each of the other defendants set up a like defense.

The Court sustained a demurrer to the cross-complaint, and on the trial of the case excluded all evidence offered by defendants to sustain their defense, and these rulings are assigned as errors.

The evidence was properly excluded; for it was not admissible for the purpose of showing that the account of the guardian, which had been settled and allowed by the Probate Court, was not a true and correct statement of his transactions as guardian with the estate of his ward. That Court had jurisdiction of the estate, and of the person of the guardian and of the settlement of his accounts; and if it committed any error or irregularities in the exercise of its jurisdiction, the guardian had an adequate remedy for their review and correction by appeal from the judgment or order. No appeal was taken; and when the action was tried the judgment or order remained in full vigor. There was, therefore, an end of all inquiry into the correctness of the account, as it had been finally settled by the proper tribunal.

Nor was the evidence admissible for the purpose of showing a disability on the part of the guardian to defend himself in the settlement and allowance of the account. The presumption is that the guardian was sane when he presented his final account to the Probate Court and when the Court adjudicated it. No suggestion of insanity was made at any time during the course of the judicial proceedings against him. If there had been, the Court, in the exercise of its authority, would have considered the matter, and if found true would have appointed some person to represent him. In the absence of such a suggestion the Court rightfully exercised its jurisdiction over the person of the guardian, and the judgment which it rendered against him was conclusive;

for the settlement and allowance of the final account was a matter vested exclusively by the Constitution and laws in the Court (Article VI, Constitution of 1862; Section 97 C. C. P.; *Allen vs. Tiffany*, 53 Cal. 16); and its judgment could not be successfully resisted until reversed or modified by some proceedings directly impeaching it. It was conclusive not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes the sureties. (*Irwin vs. Backus*, 25 Cal. 214; *Fox vs. Minor*, 32 Ib. 112.) The judgment was, therefore, not subject to collateral attack.

There is no pretense of imbecility or incompetency of the guardian at the time of giving the bond and qualifying as guardian. If he became so at any time afterwards, the fact did not interfere with the jurisdiction of the Court over the estate of the ward and the person of the guardian, and it constitutes no defense to an action against the guardian and his sureties upon his official bond.

"The fact," says the Supreme Court of New Hampshire, "that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney, or not at all, is good cause to reverse the judgment upon a writ of error. * * * But the defect in the proceedings renders them only voidable and not void." (*Lamprey vs. Nudd*, 29 N. H. 303.) "And the reason," says the Supreme Court of Pennsylvania, "why the insanity or infancy of a party who suffers a common recovery cannot be set up against it, is, that it cannot be done without attacking the judgment of the Court, which to every intendment is presumed to be regular and valid until reversed or set aside in due course of law. The judgment of the Court is the solemn act of a competent legal tribunal, and cannot be impeached collaterally. It is presumed to have had legal and competent parties before it." (*Wood vs. Bayard*, 63 Penn. St. 320.)

It is urged that under peculiar equitable circumstances, a Court of equity has jurisdiction to open an account or other matter settled by the Probate Court. In *Clark vs. Perry*, 5 Cal. 60, and *Deck vs. Gerke*, 12 Ib. 437, that doctrine was announced and approved; but the judgment of the Court has never been assailed by a motion for a new trial, or an appeal, or by a direct proceeding to set it aside.

Conceding that in this action at law upon the guardian's bond, the defendant had the right to maintain an equitable cross-action against the estate of his former ward, to im-

peach the judgment and to surcharge and falsify his accounts, the complaint in the cross-action ought to be such as would be maintainable in a direct action on the equity side of the Court. (*Collins vs. Bartlett*, 44 Cal. 318; *Kreichbaum vs. Melton*, 49 Ib. 65.) Now, a Court of equity will not open a settled account unless for fraud, omission, or the like. If there is no fraud it will only grant liberty to surcharge and falsify the accounts. (Story's Eq. Juris. 527.) In the cross-complaint under consideration no fraud is charged. It is only alleged that the defendant, soon after he was appointed guardian, became so weak and unsound in mind that he was incompetent to attend to any business whatever; that he was in that condition when the final account of his guardianship was rendered and filed; that the accounts which he rendered were unjust and incorrect statements of his transactions as guardian; and that the final account, as settled and allowed by the Probate Court, was "*false and untrue in many particulars*;" and he asks, as relief, that the Court set aside the judgments or orders of the Probate Court, and re-open the accounts for settlement.

As a bill in equity the cross-complaint is defective. It does not contain matter sufficient to constitute an original bill, or a bill in the nature of a bill of review.

If a party seeks to set aside a judgment, and to re-open accounts which have been settled by it, on the ground that he was a lunatic at the time of the judicial proceedings against him, he should point out by distinct averments the specific mistakes or errors in the account of which he complains. As was said by the Master of the Rolls in *Taylor vs. Huxlin*, 2 Bro. Ch. 310: "A person who comes to unravel an account must always show clear grounds." A general charge of errors is not sufficient. Specific errors must be pointed out. It is not sufficient to say that he does not owe the estate, but the estate owes him; nor that the accounts were unjust and incorrect, or were false and untrue in many particulars. He must point out the particular items which he seeks to surcharge or falsify, so that the Court may know that injustice has been done him, and what it is that he would impeach; for if no injustice has been done to him the Court will not interfere. A Court of equity will not interfere to set aside even a contract made with an unknown insane person, where injustice would be done to others, unless a fraud has been committed. (78 Penn. St. 407; 38 N. J. 536; 7 Paige, 236.)

If, as the pleader alleges, the account which is sought to be impeached is only "false and untrue in many particu-

lars," it must be correct and unimpeachable in all others; and before a party can enjoin a judgment against him, he should at least pay, or offer to pay, what is correct. It is a general rule that he who seeks to restrain the enforcement of a judgment, or of judicial proceedings under it, must first pay, or tender payment of the amount due, and, failing to do this, he will be denied relief in a Court of equity. (33 Ind. 192; 44 Ala. 315.)

The lower Court did not, therefore, err in sustaining the demurrer to the cross-complaint, or in excluding the evidence of the defendants under the answers.

The judgment is therefore affirmed.

I concur: Ross, J.

I concur on the ground that the cross-complaint does not contain a statement of facts such as would entitle the defendant to relief: McKinstry, J.

IN BANK.

[Filed January 24, 1881.]

No. 6754.

F. O. WILKINSON, APPELLANT,

vs.

EDWARD MERRILL, RESPONDENT.

CONCLUSIVENESS OF DECISIONS OF U. S. LAND DEPARTMENT AS TO RIGHT TO PURCHASE PUBLIC LAND. Where in a contest as to the right to purchase certain public land it appeared that the same contest substantially had been heard before the United States Land Department and there decided in favor of defendant: Held, that such decision was conclusive, unless it could be shown that there had been fraud or fraudulent imposition on the officers of the United States, which controlled their decision.

DATE OF FILING MAP IN U. S. LAND OFFICE, WHERE MAP WITHDRAWN AND RE-FILED. Where the Act of Congress of July 23, 1866, for quieting land titles in California, provided that applications to purchase under it should be filed within ninety days after the filing of the township map in the United States Land Office; and it appeared that the map had been filed and then withdrawn, and afterwards refiled: Held, that when the map was withdrawn by proper authority it was as though it had never been filed, and that the day of its return to the files was, in contemplation of law, the date of its filing, from which the ninety days were to be counted.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Hartman & Haly, for appellant.

Henry Hancock, for respondent.

McKEE, J., delivered the opinion of the Court:

In a contention under an Act of Congress passed July 23, 1866, between the defendant and the plaintiff in this case, before the Register and Receiver of the United States Land Office, involving the rights of the parties to a tract of land, which is now, as it was then, the subject of controversy between them, the Commissioner of the Land Office, by his judgment, canceled the pre-emption claim of the plaintiff to the land, and adjudged that the locations, which had been made by the defendant upon the land under the laws of the State, were regular and valid, and that the State was entitled to have the land listed to it for the use of the defendant. This judgment was afterwards affirmed by the Secretary of the Interior, and under it the land was thereafter listed to the State.

Notwithstanding that judgment, the plaintiff claims the right to purchase the land from the State against the locations which were made upon it by the defendant, and which were declared by the judgment to be regular and valid.

But the judgment is decisive of the rights of the parties to the land. Such was the decision of the late Supreme Court when the case was before it on a former appeal. "The decision of the Land Department," say the Court, "was conclusive against the plaintiff, who subsequently sought to acquire title from the State." (*Wilkinson vs. Merrill*, 52 Cal. 424.)

That decision must be regarded as the law of the case, unless the case itself has undergone a change in its facts or the pleadings. The facts of the case are substantially the same. The pleadings have been changed; for, when the remittitur went down to the Court below, the plaintiff amended his complaint, by alleging matters of fraud, and fraudulent imposition by the defendant, on the officers of the United States, which, it was charged, controlled their decision in the controversy between the defendant and the plaintiff, by which the land was awarded to the State for the use of the defendant. The charges were denied by the defendant, and the issue raised by them constituted the only new feature in the case.

Upon the trial the Court below found: "That the selection approved by the Commissioner of the General Land Office, and affirmed by the Secretary of the Interior, was *not* procured by fraudulent representations and contrivances of the defendant, or by mistake in law by the Commissioner or Secretary of the Interior, or from want of information of the facts concerning the location of Edward Merrill."

It is assigned as error that the finding is not supported by the evidence—and a like assignment is made to almost each particular finding in the case. But the assignments are unsustainable; for the evidence in the record before us sufficiently sustains the finding, as well as the other findings of fact in the case; none of them is contrary to the evidence, and each is sufficiently sustained by it.

Again, it is objected that the conclusion of law drawn by the Court from its findings, to the effect that the defendant is entitled to purchase the land from the State, is erroneous, because his application to purchase was not made within ninety days after the filing of the township map in the office of the Register and Receiver, as provided in Section 3 of the Act of July 23, 1866. The map was filed in the office on the 27th of April, 1868, but it was afterwards withdrawn, and was refiled on the 21st day of November, 1871. Defendant made his application to purchase the land in January, 1872, and supplemented it by other applications after that date. The application was made within ninety days after the refileing. When the filing of a map is withdrawn by the proper authority, it is as though the map had never been filed, and the day of its return to the files is, in contemplation of law, the date of its filing.

Judgment and order affirmed.

We concur: McKinstry, J., Sharpstein, J., Thornton, J.

DISSENTING OPINION.

A brief history of this land, gathered from the transcript, will be of service in ascertaining the rights of the parties.

At all times, from a day prior to the acquisition of California, until December 25, 1875, the land in controversy was claimed by the holders of the Mexican grant of the Rancho Sausal Redondo to be within the exterior lines and to be a part of the rancho. Hancock, as Deputy United States Surveyor, made a survey of the rancho, by which survey the land in controversy was excluded. As County Surveyor, Hancock made a survey of the land by section and subdivision.

1857—June 23d, school land warrant No. 156 was located on behalf of the defendant Merrill by Hancock, County Surveyor, on E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 21, T. 2 S., R. 13 W., S. B. M.

1858—The Hancock survey of the rancho was rejected by the United States Surveyor-General.

1868—February, Hansen, Deputy United States Surveyor, made a survey of the rancho by order of the Surveyor-General, to segregate the grant from the public lands.

1868—April 27th, plat filed in the U. S. Land Office.

1868—May 12th, selected by the State, in the office of the Register of the U. S. Land Office, for Merrill, under the warrant No. 156.

1868—May 27th, plat withdrawn by order of the Land Department of the United States.

1868—July 3d, The United States Surveyor-General directed Thompson, Deputy U. S. Surveyor, to re-survey the rancho. In the same year the re-survey was made.

1870—Plaintiff, Wilkinson, went into possession, where he has remained ever since, using the land, and has made substantial and valuable improvements.

1871—November 21st, plat refiled.

1872—March 12th, plat again withdrawn and survey suspended.

1872—June 15th, order of the Land Department relieving the suspension.

1872—July 27th, application by Hancock, on behalf of Merrill, to relocate school land warrant No. 156.

1875—December 25, survey of the Rancho Sausal Redondo finally approved by the Commissioner of the General Land Office, which determined that the land was not within the limits of the rancho. This was substantially the Hansen survey.

1876—February 8th, plaintiff applied to purchase the land under the laws of this State.

1876—March 20th, the land was listed to the State.

Merrill has been a non-resident of this State since 1858; there is no evidence that he ever saw the land.

Under this state of facts, neither party could acquire any title or foundation of title from the State prior to December 25, 1875. Until that time it had not been determined whether the land would be a part of the Mexican grant or a part of the public domain. Until such determination a school land warrant could not be located upon it, and the acts of officers, Federal or State, in that direction, would be without authority, and therefore void. The fact that officers assume to act and issue papers purporting to convey the title of the Government, Federal or State, where they have no authority, does not aid their grantee. Merrill is not aided by the Act of July 23, 1866; that Act relates to selections theretofore made of any portion of the *public domain*; the land in controversy was not, then, a portion of the public domain open for selection.

As between the parties to this controversy, Merrill has no right to purchase the land from the State. MYRICK, J.

IN BANK.

[Filed January 24, 1881.]

No. 6442.

WARREN H. MACE, APPELLANT,

vs.

EDWARD MERRILL, RESPONDENT.

CONTESTS AS TO PUBLIC LANDS—DECISIONS OF U. S. LAND DEPARTMENT WHEN CONCLUSIVE. Where A, in 1857, located a school land warrant on land then unsurveyed, and in 1858 applied to the Surveyor-General to relocate the warrant on the same land, and in 1868 the location was made by the State Locating Agent; and in 1872 A applied to the United States officers to purchase the land under Sections 1 and 3 of the Act of Congress of July 23, 1866, quieting land titles in California, which application was contested by a person claiming a pre-emption right; and the contest resulted in a judgment by the Secretary of the Interior in favor of A: *Held*, that the decision of the United States Land Department was conclusive as against the United States and against the contestant.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

V. E. Howard, Hartman & Haley, and A. Brunson, for appellant.

Henry Hancock, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

On the 22d of June, 1857, J. C. Merrill, attorney in fact of Edward Merrill, located a school land warrant on the southeast quarter of section 21, township 2 south, range 13 west, S. B. M., which was then unsurveyed land of the United States. On the 30th of April, 1858, Merrill applied to the Surveyor-General to relocate the warrant upon the same land, and on the 11th of August, 1868, the location was made by the State Locating Agent. On the 27th of July, 1872, Merrill filed in the United States Land Office an application to purchase said land under the provisions of Sections 1 and 3 of an Act of Congress, "Quieting land titles in California," approved July 23, 1866. Merrill's right to purchase was contested by Mace, the appellant herein, and denied by the local land officers. An appeal was taken to the Commissioner of the General Land Office, and from thence to the Secretary of the Interior. Both the Commissioner and Secretary were of the opinion that the location by Merrill was valid, and in pursuance thereof the land was duly certified over to the State in satisfaction of said selection and location.

In *Wilkinson vs. Merrill*, 52 Cal. 424, it was held that the decision of the Land Department of the United States to which "all the questions of law and fact pertaining to the proceeding were specially confided" was conclusive as against the United States and against the plaintiff in that action, who subsequently attempted to acquire the title from the State.

As before stated, the appellant herein was a party to the contest before the Land Department to which the Court refers in the case above cited, and the decision of the Department, if conclusive as against Wilkinson, is equally so as against appellant. The latter claims to have alleged and proved some facts which were not alleged and proved in *Wilkinson vs. Merrill*, *supra*, but we are unable to discover that he has presented anything which takes his case out of the doctrine of that case. If the principle upon which that decision is based be sound, and we think that it is, it seems to us to be decisive of this case. And the grounds of that decision are so plainly and succinctly stated as to render a restatement of them wholly unnecessary.

Judgment and order affirmed.

We concur: McKinsty, J., McKee, J., Thornton, J.

DISSENTING OPINION.

A controversy arose in the office of the Surveyor-General of this State, between the parties to this action, as to which had the better right to purchase the land in question. That controversy was referred to the Court below for determination. The Court gave judgment for the defendant, and plaintiff appealed from the judgment and from the order denying his motion for a new trial.

From the view I take of this case, it is not necessary to consider whether the lands were, prior to the first day of September, 1874, the day of the alleged last act in the process of the survey of the Tajanta Rancho, a part of the public lands of the United States; whether they were, prior to that day, subject to location by virtue of the grant to the State of school lands; or whether the plaintiff had any vested rights by reason of his attempted pre-emption. It is necessary to consider two points only, viz.:

1. The plaintiff to sustain the issues relating to his claim of right, proved that on the seventeenth day of November, 1874, he was in the actual occupation of the lands, having been so in the occupation of them some five years, and that on that day he made application to the Surveyor-General of the State to purchase the same as a part of the school lands

of the State. The Court found, however, that plaintiff had had no right to the lands.

2. The Court found that before plaintiff's application the land was located and selected on behalf of the State by virtue of school land warrant No. 227, by Edward Merrill, the defendant under the Act of May 3, 1852; that May 12, 1868, the selection was accepted by the Register of the United States Land Office; "that the defendant offered proof of his claim by himself and through his agents of his alleged purchase within the time and according to the requirements of the Act of July 23, 1866," and "that the State of California holds the said lands in trust for the defendant, and that he is entitled to a patent from the State."

The evidence to support the finding of defendant's right is, the certificate of the State Locating Agent, wherein he certifies that "I have located as a portion of the grant of five hundred thousand acres, four hundred and eighty acres of public land in the County of Los Angeles, at the request and for the use of J. C. Merrill, attorney," etc.; and other evidence to show the recognition by the officers of the Federal Land Office of the location referred to.

In connection with this the plaintiff offered in evidence certified copies of the application and affidavits upon which the certificate of the State Locating Agent was based. The application and affidavits contained the following: "I, J. C. Merrill of San Francisco County, State of California, do hereby apply under the provisions of the Act for the location and sale of school lands donated to the State, approved April 23, 1858, to purchase and locate," etc., "which I agree to accept in lieu of the full amount." The application is signed "J. C. Merrill as attorney in fact for Edward Merrill." The affidavit for location is, "I, J. C. Merrill of San Francisco County, State of California, being duly sworn, depose and say, that I am the applicant for the purchase and location," etc., and "there is no valid claim existing upon the land so described adverse to the claim I hold and apply to be located." Signed, "J. C. Merrill, as attorney in fact for Edward Merrill." The oath required by the Act of the Legislature, approved April 27, 1863, reads, "I do solemnly swear that I will support," etc., etc.; signed, "J. C. Merrill."

This evidence was offered for the purpose of showing that Edward Merrill never made an application to purchase the land; that the only application, as against plaintiff, was an application of J. C. Merrill; therefrom claiming that J. C. Merrill, not being a party to this controversy, and not having transferred his rights, if he ever acquired any, to Edward

Merrill, the certificate of location by the Locating Agent, gave Edward Merrill no right to purchase the land. Notwithstanding this evidence, the Court found in favor of defendant. This was error. If, as a fact, the certificate and subsequent proceedings were based upon the foregoing mentioned application and affidavits, they gave no right to Edward Merrill to purchase the land. The application and affidavits were those of J. C. Merrill, and bore no relation to the defendant, Edward Merrill. The fact that J. C. Merrill signed himself as "attorney in fact for Edward Merrill," makes no difference; those words are merely words of description; the application and affidavits were his own, and not for or on behalf of Edward Merrill. Besides, the certificates of the State Locating Agent states that the location was "for the use of J. C. Merrill, attorney." I find nothing in the statute authorizing a location to be for the use of any person as attorney for another. This case is not within the intent of the Act of March 24, 1870. (Stats. 1869-70, p. 352.)

I do not consider the question whether the officers of the Federal Government were imposed upon or exceeded their powers in listing the land over to the State on the application of Merrill; for the purpose of this opinion it may be assumed that the title properly passed to and is now lodged in the State; and yet under the application and affidavits above referred to, the defendant has no right to purchase the land. I do not, however, admit that the title passed to the State.

The judgment and order should be reversed, and cause remanded for a new trial.

Myrick, J.

DEPARTMENT No. 1.

[Filed January 21, 1881.]

No. 5812.

PEOPLE EX REL. COMMISSIONERS OF TRANSPORTATION,
RESPONDENT,
vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
APPELLANT.

By the Court:

Upon the authority of *People ex rel. Commissioners of Transportation vs. The Central Pacific Railroad Company*, No. 5815, judgment reversed, and Court below directed to dismiss the action.

DEPARTMENT No. 2.

[Filed January 24, 1881.]

A. H. HALL, APPELLANT,

VS.

OLIVER LONKEY AND E. R. SMITH, RESPONDENTS.

CONTROVERSY BETWEEN PARTIES ON PLEADINGS, PRAYING ONLY GENERAL RELIEF—DISCRETION OF COURT TO DECREE DISSOLUTION. In an action by one partner against others, where the facts found entitled the plaintiff to a dissolution of the partnership and a winding up of its concerns, and there was a prayer for general relief: Held, that the Court had power to decree a dissolution, although there was no specific prayer therefor in the pleadings.

DISSOLUTION OF PARTNERSHIP—DISCRETIONARY POWER TO ORDER SALE OF DEBTS DUE THE FIRM. Where, in decreeing the dissolution of a partnership and a sale of its property, the Court further decreed a sale of the debts due the firm instead of a collection of such debts: Held, within the power and discretion of the Court, and no error.

Appeal from the District Court of the Fourteenth Judicial District, Nevada County.

Johnson & Cross, for appellant,

E. H. Gaylord and *D. J. Crowley*, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

It was not error to decree a dissolution of the copartnership, although there is no specific prayer for it in the pleadings. There is a prayer for general relief, and the facts found by the Court entitled the defendants to a decree of dissolution. Under these circumstances the question whether it should be decreed or not was one which addressed itself to the sound discretion of the Court which tried the case. And its judgment will not be disturbed unless it be made to appear that such discretion has been abused. (*N. C. & S. C. Co. vs. Kidd*, 37 Cal. 282.)

Nor did the Court err in decreeing a sale of all the partnership property, which would include debts due to the firm. It might have provided for the collection of these, but it was within the power and discretion of the Court to decree a sale of them.

The appeal is from the judgment, and as that appears to be sufficiently supported by the findings, it follows that it must be affirmed.

Judgment affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 2.

[Filed January 20, 1881.]

No. 7268.

ROBERT COSNER, APPELLANT.

VS.

THE BOARD OF SUPERVISORS OF COLUSA
COUNTY, RESPONDENT.

MANDAMUS—UNCERTAINTY IN PETITION—DEMURRER. Where a petition for a writ of mandamus against the Board of Supervisors of Colusa County to compel them to proceed as required by Section 23 of the Act of 1868, in relation to the reclamation of swamp and overflowed lands, stated that the lands to be reclaimed were situated partly in Colusa County and partly in Yolo County, but did not state in which county the particular land on which the work was done was situated; and a demurrer thereto being sustained, and plaintiff declining to amend, judgment was rendered for defendant: Held, that such judgment was correct.

Appeal from the Superior Court of Colusa County.

A. C. Adams and Jackson Hatch, for appellant.

T. J. Hart and Richard Bayne, for respondent.

THORNTON, J., delivered the opinion of the Court:

Demurrer to a petition for a writ of mandate. The Court below sustained the demurrer, and the plaintiff declining to amend, judgment was rendered for the defendant.

The ruling of the Court below was correct. The petition avers, and it is admitted on the issue made by the demurrer, that the lands to be reclaimed were situated partly in the County of Yolo, and partly in the County of Colusa, and it does not appear in the petition in which county the particular lands on which the work was done in this case was performed. If the lands were in Yolo County, the Board of Supervisors of Colusa County had nothing to do with them. (See Statutes of 1868, 32d Section, Supplement to the General Laws of California, by Parker, Par. 8702; Pol. Code, 3456, 7-8, 3462.)

The judgment is affirmed.

We concur: Sharpstein, J., Myrick, J.

IN BANK.

[Filed February 9, 1881.]

No. 10,593.

THE PEOPLE, RESPONDENT,

vs.

MICHAEL FLAHAVE, APPELLANT.

CRIMINAL LAW—HOMICIDE—WHEN AN ORIGINAL ASSAILANT MAY SLAY IN SELF-DEFENSE. Where, in case of a conviction for murder, it appeared that after an altercation, from which the parties were separated, the defendant was told to leave, and did so; but while going off, the deceased ran after him, threw him down, threw himself on top, and during the ensuing struggle defendant drew a knife and inflicted the mortal wound; and the Court, against defendant's objection, instructed the jury that to justify the killing it must appear that the danger was urgent and pressing, and the killing necessary to save defendant's life or prevent great bodily harm, "and it must appear also that the person killed was the assailant, and that the slayer had really and in good faith endeavored to decline any further struggle:" Held, that it was not clear but that defendant might have been justified in the homicide, even if he had been the assailant in the first altercation, and that the instruction was therefore erroneous.

Appeal from the Superior Court of Colusa County.

Jackson Hatch, for appellant.

A. L. Hart, Attorney-General, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The defendant was tried and convicted upon a charge of murder. Among the instructions given by the Court and excepted to by the defendant was the following:

"To justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary, and it must appear also that the person killed was the assailant, and that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

There was evidence which tended to prove that just prior to the homicide the defendant and deceased were engaged in an altercation, during which they were separated by the intervention of one or more other persons; that the defendant was told to leave, that he did so, and when he had gone about 100 feet he was overtaken by the deceased, thrown upon the ground by him, and while in that position, with the deceased on the top of him, the defendant with a knife inflicted the wound of which the deceased died. There was

evidence from which the jury might have inferred that the defendant was the assailant in the altercation immediately preceding the fatal rencounter. Upon this state of the evidence the instruction quoted is plainly erroneous. The defendant was entitled, under the evidence, to have the question whether he slew the deceased in necessary self-defense fairly submitted to the jury, and to have the jury instructed that if it appeared that he was the assailant in the altercation which immediately preceded the killing, he would be justified, after having endeavored really and in good faith to decline any further struggle, before the homicide was committed, in killing the deceased, if there was reasonable ground to apprehend a design on the part of the latter to do the defendant some great bodily injury, and imminent danger of such design being accomplished. Instead of that, however, the jury were instructed that in order to make this defense available, it must appear that the person killed was the assailant. And if the jury inferred, as they might from the evidence, that the defendant was the assailant, it would not matter under that instruction how imminent the danger might have been of his receiving some great bodily injury from his adversary, or how great his real and *bona fide* efforts might have been to decline any further struggle with the deceased, the homicide would not be justifiable.

It is quite apparent that the Court attempted to give an instruction which would embody the law on this subject as it stood prior to the enactment of the Code; but the substitution of the word "and" for "or" immediately after the word "assailant," would have made the instruction no less erroneous under the former than it is under the present statute.

But the Court in some of the instructions given at the request of the defendant gave the law on the subject as laid down in the Code. The latter instructions are clearly repugnant to the one above quoted, and that of itself is a sufficient ground for the reversal of the judgment. (*Brown vs. McAllister*, 39 Cal. 577; *Estate of Cunningham*, 52 *Id.* 465; *People vs. Anderson*, 44 *Id.* 69; *People vs. Valencia*, 43 *Id.* 555.)

The instructions above quoted would not have been correct in any case, and it must be presumed to have been prejudicial to the defendant in this case, one phase of which called for a correct instruction upon the point as to which an erroneous one was given. (*People vs. Ybarra*, 17 Cal. 171.)

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., McKinstry, J., Ross, J.

DEPARTMENT No. 1.

[Filed February 2, 1881.]

No. 7507.

B. F. MEYERS, JUDGE, ETC., PETITIONER,

VS.

D. M. KENFIELD, CONTROLLER, ETC., RESPONDENT.

SALARY OF JUDGE—AFFIDAVIT THAT NO CASES REMAIN UNDECIDED FOR NINETY DAYS. Where a Judge of a Superior Court at the end of a certain month failed to present to the Controller of State an affidavit that no case in his Court remained undecided that had been submitted for ninety days, but at the end of the next month he presented such an affidavit, and the Controller claimed that he was not entitled to any salary for the first month: Held, that, upon presenting the affidavit, he was entitled to his salary for both months.

CONSTRUCTION OF ARTICLE VI, SECTION 24 OF CONSTITUTION. Section 24 of Article IV of the Constitution in relation to the affidavit required of Judges, to the effect that no cases submitted remain undecided for ninety days, was not intended to work a forfeiture of salary as a result of a failure to decide all cases within ninety days, but merely to prohibit them from receiving their monthly salaries until all cases that had been submitted for ninety days were decided.

Mandamus.

A. C. Freeman, for petitioner.

MORRISON, C. J., delivered the opinion of the Court:

This is an application for a peremptory writ of mandamus. The plaintiff is the Superior Judge in and for the County of Placer, and the defendant is the Controller of the State of California.

The petition sets forth "that on the twelfth day of October, 1880, there was due this affiant from the State the sum of \$250, his salary as such Judge aforesaid, payable by the State, for the months of August and September, 1880. That on said twelfth day of October, 1880, he applied to said Controller for said salary (meaning for his warrant upon the Treasurer of State for said sum of money due him as aforesaid), and accompanied said application with his affidavit * * * to the effect that no cause in his Court remained undecided that had been submitted to him for decision for the period of ninety days; that thereupon said Controller gave him his warrant for \$125, but refused his warrant for the remaining \$125.

The answer of the defendant is as follows: "That on the thirty-first day of August, 1880, the warrant for the petitioner's salary for the month of August, 1880, was prepared by respondent for delivery to said petitioner; that said warrant still remains in the office of respondent undelivered; that petitioner has not at any time presented to respondent, or filed in the office of Controller of State, any affidavit showing that on the thirty-first day of August, 1880, no cause in petitioner's Court remained undecided that had been submitted to him for decision for the period of ninety days." To this answer the plaintiff interposed a demurrer, and the only question for us to determine is, does the answer set up any defense?

The ground taken by the Controller is, that to entitle the plaintiff to his salary for the month of August it must appear that on the thirty-first day of that month no case remained undecided that had been submitted for ninety days. The position taken by the Controller is, in plain language, simply this: That if a Judge allows any cause to remain undecided for the period of ninety days, he forfeits the salary for the month immediately preceding the expiration of such term of ninety days.

The provision of the Constitution is that "No Judge of a Superior Court nor of the Supreme Court shall after the first day of July, 1880, be allowed to draw or receive any monthly salary unless he shall take and subscribe an affidavit, before an officer entitled to administer oaths, that no cause in his Court remains undecided that has been submitted for decision for the period of ninety days."

There is nothing in the foregoing constitutional provision which indicates the intention that a forfeiture of salary should be the result of a failure to decide all cases within ninety days. But the purpose of the provision was, to prohibit the Judge from receiving his monthly salary until all cases that had been submitted for ninety days were decided. If, for instance, there were cases pending undecided on the thirty-first day of August, which had been submitted for ninety days, the Judge was not entitled at that time to his salary for that month; but if such cases were decided on the first of September, he would then have a right to demand immediately a warrant for his salary for August. We find no difficulty in holding that such is the meaning of the clause in the Constitution (Article VI, Section 24.) Demurrer sustained.

Let the writ issue as prayed for.

We concur: Ross, J., Thornton, J.

DEPARTMENT No. 1.

[Filed February 7, 1881.]

No. 6325.

WILLIAM L. URTON, APPELLANT,

VS.

THOMAS PRICE, RESPONDENT.

ACTION FOR PERSONAL INJURIES AGAINST SEVERAL—RECEIPT OF SATISFACTION FROM ONE—CONSTRUCTION OF RELEASE. Where A, having received personal injuries from an explosion at a lecture on chemistry delivered by B before the Mechanics' Institute, brought an action therefor against B, and afterwards amended his complaint by making the Mechanics' Institute a party defendant; and subsequently, in consideration of \$500 paid, executed a release to the Mechanics' Institute, in which he acknowledged having "received satisfaction for the injury alleged in the complaint," and released "all demands and claims arising from personal injuries to him or for which he brought suit," etc.: *Held*, that the transaction constituted a satisfaction for all injuries, and that A could not recover further damages from B.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

Stetson & Houghton, for appellant.

G. F. & W. H. Sharp, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The action was originally brought against the defendant Price to recover damages received by plaintiff by reason of the negligent manner in which the defendant conducted an experiment in chemistry, in the course of a public lecture at which plaintiff was lawfully present (the defendant Price attempting to pass a current of oxygen gas over or through "naphthaline"), which resulted in an explosion and the shattering of a glass receiver, by means whereof plaintiff's eye was injured and its sight destroyed.

After defendant Price had answered, plaintiff obtained leave of the Court to amend his complaint by making the "Mechanics' Institute" a party defendant, and charging the injury to have been done through the negligence of the Institute. Price and the Mechanics' Institute answered the amended complaint on the eighteenth of July, 1872, and April 14, 1876, the plaintiff filed a stipulation and direction:

"The above entitled cause has been settled and is hereby discontinued and dismissed as to the Mechanics' Institute of the City of San Francisco, and the Clerk of said Court is hereby directed to enter a dismissal thereof of record."

This was followed April 17, 1876, by a judgment dismissing the action as against the Mechanics' Institute.

The next day defendant Price filed an amended answer to the effect "that after committing the supposed grievances alleged in said complaint, and after the commencement of this action—to wit, on the twelfth day of April, 1876, the defendant, the Mechanics' Institute, delivered to the plaintiff, and the plaintiff accepted and received from the defendant, the Mechanics' Institute, the sum of five hundred dollars, gold coin of the United States, in full satisfaction and discharge of the damages and cause of action alleged in said complaint."

The bill of exceptions shows the following release:

"Know all men by these presents, that I, William L. Urton, of Sonoma County, California, for and in consideration of the sum of five hundred dollars (\$500), in gold coin of the United States of America, to me in hand paid by the Mechanics' Institute, a corporation having its principal place of business in San Francisco, State aforesaid, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, and administrators, remise, release, and forever discharge the said Mechanics' Institute, a corporation, and each of its officers and members, their heirs, executors and administrators, of and from all manner of actions and cause of actions, suits, debts, dues, sums of money, accounts, controversies, variances, trespasses, damages, claims and demands whatsoever, in law or in equity, which against the said Mechanics' Institute, a corporation, or any of its officers or members, I ever had, or now have, or which I or my heirs, executors or administrators hereafter can, shall, or may have, for, upon, or by reason of any matter, thing, or cause whatsoever, from the beginning of the world to the date of these presents, and particularly of and from all demands or claims of every nature arising from personal injuries to me, or for which I brought suit No. 16,340 in the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco, by complaint filed November 8, 1870, and amended complaint filed August 24, 1871.

"In witness whereof, I have hereunto set my hand and seal, this thirteenth day of April, A. D. one thousand eight hundred and seventy-six.

W. L. URTON."

The jury found a special verdict. Among other facts found were: "The plaintiff received satisfaction for the injury alleged in the complaint from the defendant, the Mechanics' Institute." * * * "The plaintiff received damages

in the sum of five hundred dollars." The evidence shows that five hundred dollars was in fact paid to plaintiff by the Mechanics' Institute.

It will be seen that the five hundred dollars was paid for the release of all suits, damages, etc., claims and demands, etc., from the beginning of the world, "and particularly of and from all demands and claims * * * arising from personal injuries to me, *or for which I brought suit* No. 16,340 in the District Court of the Fourth Judicial District of the State of California, by *complaint filed* November 8, 1870, and amended complaint filed August 24, 1871." The complaint of November 8, 1870 (the original in this action), was filed some nine months before the Mechanics' Institute was made a party defendant.

We entertain little doubt that the transaction was intended to constitute a satisfaction for all the injuries received by plaintiff. Whether so or not the plaintiff, as appears from the finding of the jury and the release, has been fully compensated by the payment of a sum equal to all the damages he has suffered. He cannot recover more from any one. "It is to be observed," says Dr. Cooley in his work on the Law of Torts, page 139, "when the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." (See cases cited by Judge Cooley.)

Order affirmed.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed January 28, 1881.]

No. 6750.

WITHERS vs. LITTLE ET ALs.

The decision in the above entitled cause, rendered on December 29, 1880, will be found in Pacific Coast Law Journal, volume 6, page 924. This decision modifies it as follows:

By the COURT:

The judgment heretofore rendered in this case is modified so as to read as follows:

The judgment herein is reversed, and the cause remanded for a new trial.

The petition for a hearing in bank is denied.

DEPARTMENT No. 2.

[Filed February 9, 1881.]

No. 6580.

D. HARNEY, RESPONDENT,

VS.

J. D. APPLGATE ET AL., APPELLANTS.

STREET ASSESSMENTS—DISMISSAL OF ACTION AS AGAINST OWNERS AND REFUSAL TO ALLOW OTHER DEFENDANTS TO AVAIL THEMSELVES OF OBJECTIONS. Where in an action on a street assessment in San Francisco, on a complaint alleging certain of the defendants to be owners of the property, plaintiff on the trial was allowed to dismiss as to the owners; and a motion of the other defendants to have time to amend their answers, so as to show the parties so dismissed to be the owners, and therefore material and necessary parties defendant, was refused: *Held*, that such refusal was error.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

B. S. Brooks and *Wm. Leviston*, for appellants.

J. M. Wood, for respondent.

MORRISON, C. J., delivered the following opinion:

Plaintiff brought suit against a large number of defendants to enforce a lien for work done by him upon a certain street in the City and County of San Francisco.

The averment in the complaint respecting the ownership of the property sought to be charged with the lien is as follows: "That the said defendants at and during all the time of taking the aforementioned proceedings, and particularly on the 29th day of October, 1875, were and still continue to be the owners of certain portions of the lots and lands aforesaid assessed, and liable to assessment as aforesaid for the work so done as aforesaid; that is to say, all the defendants now are, and on the day last aforesaid were and ever since then have been the owners in fee of the following described lot of land situate in the said city and county, adjacent to said work and liable to assessment for its proportion of the cost of the same, to wit:" (Here follows a description of the property upon which the lien is claimed.)

When the case was called for trial in the District Court, counsel who represented some of the defendants, suggested that the Court had not obtained jurisdiction over the defendants Lawrence, Applegate and others, and moved the Court to continue the case until they were brought in. Counsel for the plaintiff thereupon moved for leave to dismiss

as to said defendants Lawrence, Applegate and others, and that the complaint be amended by *striking out in the caption* thereof the names of said defendants. Counsel for some of the defendants then before the Court, thereupon objected on the ground that the defendants Lawrence, Applegate and others were alleged in the complaint to be owners of the property on which the lien was sought to be foreclosed, and were necessary parties to the suit. The Court granted the motion to dismiss the suit as to said parties, and allowed the amendment. The complaint was thereupon amended, and exception duly taken.

Counsel for said defendants then asked leave to answer the complaint as amended, and to amend their answer by setting up that said parties, as to whom said suit had been so dismissed, were owners of the premises on which the lien was sought to be foreclosed, and therefore necessary and material parties.

The Court—"I will require a showing."

Counsel—"I ask time to make a showing."

The Court refused to give time and refused to grant time to amend their answer, to which defendants duly excepted.

The Court thereupon proceeded to try the case, and rendered judgment in favor of the plaintiff and against all the defendants not dismissed from the action.

It is not necessary for us to determine the question whether the mode of amending a complaint, which was pursued in this case, by simply striking the names of some of the defendants from the caption of the complaint, is a proper practice, or to pass upon the other question raised, whether the defendants were entitled to service of a copy of the complaint as amended, for the reason that there is another ground upon which the judgment of the Court below must be reversed.

By the complaint it appeared that Lawrence, Applegate and others were joint owners of the lot, and as such they were necessary parties to the suit.

In the case of *Clark vs. Porter*, 53 Cal. 409, the Court says: "It is alleged in the complaint that the defendant Porter and several other persons, who are made defendants, are the owners of the lot charged with the lien of the assessment; and the allegation is not denied by the answer of the respondent Porter. At the hearing, the plaintiff, against the objection of Porter, dismissed the action as to all of the defendants except Porter, and the Court gave judgment against Porter alone, without amendment of the complaint. This was error. The thirteenth section of the Act as amended in 1870, provides that the action shall be brought against the

owners and all persons having an interest in the property sought to be charged. It was not contemplated by the statute that the interest of only one, or of any number less than all, of the joint owners of the property should be subjected to sale for the satisfaction of the lien of the assessment."

In the more recent case of *Diggins vs. Reay*, 54 Cal. 525, the Court announced the same doctrine; in that case Mr. Justice Thornton delivering the opinion of the Court, says: "That the statute gives no authority for a decree enforcing the lien (street assessment) in the absence of one of the parties in interest."

In the case we are now considering the defendants were informed by the complaint that Lawrence, Applegate and others were interested, as tenants in common or otherwise, in the lot sought to be charged with the lien, and they had a right to have such interest contribute its due proportion of the payment of any judgment the plaintiff might obtain.

If by the amendment made at the hearing of the cause it was made to appear by the complaint that they did not have any interest in the lot, it was the right of the defendants to amend their answer so as to bring the fact that they had an interest before the Court, and to urge it as a reason why some of the parties interested should not be proceeded against to judgment, until all the parties interested in the property were brought into the case.

Judgment and order reversed.

I concur: Myrick, J.

I concur in the judgment: Thornton, J.

IN BANK.

[Filed January 18, 1881.]

No. 10,549.

THE PEOPLE, RESPONDENT,

vs.

MAT AH KIE, APPELLANT.

Appeal from the Superior Court of San Francisco City and County.

Delos Lake and Thomas D. Reardon, for appellant.

A. L. Hart, Attorney-General, for respondent.

By the COURT:

On the authority of *People vs. Shubrick*, No. 10,590, judgment and order affirmed.

IN BANK.

[Filed January 28, 1881.]

No. 7566.

UNIVERSITY OF CALIFORNIA, APPELLANT,

vs.

A. P. BERNARD, RESPONDENT.

ACT OF APRIL 16, 1880, FOR FUNDING COUNTY INDEBTEDNESS CONSTITUTIONAL. The Act of April 16, 1880, "to add five new sections to the Political Code, providing for funding and refunding county indebtedness," is a general and not a special or local Act; and it is therefore not in conflict with the provisions of Sections 24 and 25 of Article IV of the Constitution.

Appeal from the Superior Court of Kern County.

Flouroy & Mhoon, for appellant.

George V. Smith, for respondent.

THORNTON, J., delivered the opinion of the Court:

The decision of this cause turns on the constitutionality of an Act of the Legislature, approved April 16, 1880 (see Amendments to Codes for 1880, p. 62), entitled "An Act to add five new sections to the Political Code providing for funding and refunding county indebtedness."

It is contended that this Act is in conflict with the provisions of Sections 24 and 25, Article IV, of the Constitution of this State. After careful examination of the sections referred to, we have failed to detect any such conflict. The statute, in our opinion, is general, and not special or local, and although it adds five new sections to the Political Code, it is in itself an independent Act. The mischief which Section 24 above referred to was intended to prevent, does not appear in this Act at all. To hold that it is unconstitutional, would be an unwarrantable interference with the powers vested in the Legislature by the Constitution. The rule defining the duties of the judiciary in passing on the constitutionality of an Act of the Legislature is well settled in this State, that such an Act should not be declared unconstitutional and void, unless there is a clear repugnance between the Act and the Constitution; and where there is a reasonable doubt whether the Act is repugnant to the Constitution, its constitutionality should be affirmed. (*Bourland vs. Hildreth*, 26 Cal. 162; *Day vs. Jones*, 31 Id. 263; *Appeal of N. B. and M. R. R. Co.*, 32 Id. 527; *Ex parte Shrader*, 33 Id. 279; *Corwin vs. Ward*, 35 Id. 191; *Brooks vs. Hyde*, 37 Id. 375; *Ex parte Smith*, 38 Id. 710; *S. and V. R. R. Co. vs. City of Stockton*, 41 Id. 157, 60, 61, 62 and cases there cited.)

There is in our opinion no reasonable doubt that it was within the competency of the Legislature to enact the statute above referred to, and therefore the judgment in this cause should be affirmed. So ordered.

We concur: Sharpstein, J., Myrick, J., Morrison, C. J., Ross, J.

(Mr. Justice McKee, being disqualified, took no part in the decision of this case.)

DEPARTMENT No. 1.

[Filed February 7, 1881.]

No. 6930.

RECLAMATION DISTRICT No. 3, RESPONDENT,
vs.

JOHN A. KENNEDY ET AL., APPELLANTS.

A RECLAMATION DISTRICT TO COLLECT ASSESSMENTS UNDER THE POLITICAL CODE MUST BE FORMED OR REORGANIZED UNDER IT. Where an action was brought by a Reclamation District to enforce an alleged assessment for reclamation purposes, made under and pursuant to the provisions of the Political Code (Section 3446 *et seq.*); and it appeared that the district was not formed under the Code, or re-organized under it as provided in Section 3478 thereof: *Held*, that the provisions of the Code had no application, and that the assessment based upon them was unauthorized and void.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

Haymond & Allen and *J. H. McKune*, for appellants.

G. A. Blanchard, District Attorney, *S. C. Freeman* and *W. C. Van Fleet*, for respondent.

Ross, J., delivered the opinion of the Court:

Sections 3446 *et seq.* of the Political Code provide for the formation, by petition, etc., of reclamation districts. Section 3452 provides: "After the approval of the petition, the petitioners, or a majority of them, may make by-laws for the management of the district, and must elect three persons owning land in the district, to act as a Board of Trustees thereof," etc.

Section 3543: "The by-laws thus adopted must be signed by the holders of certificates of purchase or patents representing at least one-half of the land so to be reclaimed or benefited, and be recorded by the County Recorder in the same book and immediately following the petition."

Section 3454: "The Board thus formed has power to elect one of their number President thereof, and to employ engineers to survey, plan, locate and estimate the cost of the work necessary for reclamation," etc.

Section 3455: "The Board of Trustees must report to the Board of Supervisors of the county, or, if the district is in more than one county, then to the Board of Supervisors in each county in which the district is situated, the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence, repairs, etc."

Section 3546: "The Board by which the district was formed must appoint three commissioners, disinterested persons, residents of the county in which the district or some part thereof is situated, who must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works," etc.

Section 3459: "If the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance and repair of the reclamation works, the trustees must present to the Board of Supervisors by which the district was formed, a statement of the work done, or to be done, and its estimated cost, and the Board must make an order directing the commissioners who made the original assessment, or other commissioners, to be named in such order, to assess the amount of such estimated cost as a charge upon the lands within the district, which assessment must be made and collected in the same manner as the original assessment." Other provisions of the Code follow, in which is declared the mode of making the assessment, etc.

By Section 3478 it is provided that "Districts formed under laws in force prior to May 28, 1868, may re-organize under the provisions of this chapter," to-wit, Chapter I, Title VIII of the Political Code.

The present action was brought to enforce an alleged assessment for reclamation purposes, made under and pursuant to the provisions of the Political Code. But the plaintiff was not originally formed under the provisions of that Code, nor was it re-organized thereunder by virtue of Section 3478, *supra*. The provisions of the Code having no application to the plaintiff, the assessment based upon them was unauthorized and void.

Judgment and order reversed, and cause remanded.

We concur: McKinstry, J., Morrison, C. J.

IN BANK.

[Filed January 18, 1881.]

No. 10,587.

THE PEOPLE, RESPONDENT,
VS.

STEPHEN MALASPINA, APPELLANT.

CRIMINAL LAW—FAILURE TO PROVE AN ALIBI NOT A CIRCUMSTANCE OF "GREAT WEIGHT" AGAINST A PRISONER. On a trial for murder, where the defendant, among other defenses, tried to prove an *alibi*, and the Court charged "that an unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against a prisoner, because the resort to that kind of a defense implies an admission of the truth and relevancy of the facts alleged and the correctness of the inference drawn from them, if they remain uncontradicted:" Held, error.

Appeal from the Superior Court of Sierra County.

M. Farley, for appellant.*A. L. Hart*, Attorney-General, for respondent.

MYRICK, J., delivered the following opinion:

The defendant was by information accused of the crime of murder; he was found guilty of murder in the first degree, and judgment of death was pronounced.

1. The conviction was had entirely upon circumstantial evidence, so far as the defendant was connected with the homicide. As a circumstance the prosecution proved by one Reichert that a short time before the homicide, the defendant, Malaspina, was seen at Sierra City in company with an alleged co-conspirator and the deceased, and that the defendant was armed with a new pistol. The defendant, being examined as a witness in his own behalf, was asked the question, "Why were you carrying the pistol with regard to which Reichert testified?" The prosecution objected, and the objection was sustained.

This ruling was error. The object of proving that defendant had the pistol was to show that he was possessed of means for taking the life of deceased, bullet and knife wounds being found upon the body. If the possession of the pistol, and the fact that he fired it in the way of testing it or for other purposes, were circumstances tending to connect him with the homicide, he was clearly entitled to place before the jury his version of the circumstances and his reasons for having the pistol. The jury would, of course, determine whether his alleged reasons were true or pretended; but he had the right to give the testimony.

2. The defendant attempted to prove an *alibi*. In reference to that subject, the Court charged the jury: "That an unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against the prisoner, because the resort to that kind of a defense implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted." This was error. We think it cannot be said, as a matter of law, that an unsuccessful attempt to prove an *alibi* is a circumstance of "great weight" against a prisoner.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Sharpstein, J., Morrison, C. J.

We concur in the judgment on the ground last stated by Mr. Justice Myrick: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed February 5, 1881.]

No. 5817.

HENRY P. WAKELEE, APPELLANT,

VS.

ERWIN DAVIS, RESPONDENT.

QUESTION OF OPENING JUDGMENT TO SET IN DEFENSE OF DISCHARGE IN BANKRUPTCY. Where a money judgment was recorded against a defendant on November 18, 1873, and a motion to set it aside and allow defendant to plead his final discharge in bankruptcy was made on April 12, 1877, and granted on July 18, 1877: Held, on appeal, that the order should be reversed.

Appeal from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

W. H. L. Barnes, for appellant.

C. Dorsey, for respondent.

By the COURT:

This is an appeal from an order made July 10, 1877, granting defendant's motion to the extent of vacating and setting aside a judgment against him and allowing him to plead his final discharge in bankruptcy. The judgment was recorded November 18, 1873, and the notice of the motion was given April 12, 1877. On the authority of *Bell vs. Thompson*, 19 Cal. 706; *Casement vs. Ringold*, 28 Cal. 335; *Sanchez vs. Carriaga*, 31 Cal. 170; and *Murdock vs. De Vries*, 37 Cal. 527, the order is reversed.

IN BANK.

[Filed January 21, 1881.]

No. 10,570.

THE PEOPLE, APPELLANT,

VS.

HARRY CADMAN, RESPONDENT.

CRIMINAL LAW—PENAL CODE, SEC. 519—THE RIGHT TO PROSECUTE AN APPEAL "PROPERTY." The right to take and prosecute an appeal is property within the meaning of Section 519 of the Penal Code in relation to sending threatening letter, with intent to extort money or other property.

A THREAT TO INDUCE DISMISSAL OF APPEAL A THREAT TO EXTORT PROPERTY. A threat made for the purpose of inducing appellant to dismiss an appeal, is a threat made with intent to extort property from another.

A "THREATENING LETTER" NEED NOT BE SUBSCRIBED BY THE PERSON SENDING IT. To constitute the crime of sending a threatening letter with intent to extort money or other property, under Section 519 of the Penal Code, it is not indispensably necessary for the letter so sent to be subscribed by the person sending it.

SUFFICIENCY OF INFORMATION FOR SENDING A THREATENING LETTER. An information charging accused with having sent a letter containing a threat to expose the disgrace of the person to whom sent, with intent to induce him to dismiss an appeal, though it appears that such letter was subscribed by another person, is sufficient.

Appeal from the Superior Court of the City and County of San Francisco.

A. L. Hart, Attorney General, for appellant.

George W. Tyler, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The information filed in this case was demurred to on the ground that the facts stated do not constitute a public offense. The demurrer was sustained, the information dismissed, and this appeal is taken on behalf of the people.

The defendant is accused by the information of having sent to one Mitchell Clune a letter which expressed and implied a threat to impute to him disgrace and to expose the same, with intent to extort money and property from him. The information contains what purports to be a copy of the letter so sent, which purports to have been signed by "H. Keller & Co.," and underneath the signature are the letters "H. C.," crossed. It is addressed to M. Clune, and reads as follows:

"Having recently received a duly attested transcript of certain proceedings relating to yourself, taken some time ago in

the 'Circuit Court United States Middle District,' Nashville, Tenn., with affidavits of the Captain of Police, United States District Attorney and others, which would be ruinous to your character and testimony, either in a Court of justice or in your business relations with others, we give you this opportunity of withdrawing your appeal in the case of *McLenny vs. Clune*, and your action, versus *Cadman and Gibson*. Should you not do so we shall have to make the knowledge in our possession known to others and the public generally. If you comply with this suggestion within ten days we agree to tell no one of your past career. Our only object in making this proposition is to save the trouble and expense of litigation, as the result of both actions (it is not a matter of doubt) is certain to be in our favor. This offer is only open to the nineteenth inst., and either ourselves or counsel must be notified if accepted."

To constitute an offense under the Code a person must send or deliver to some person a letter or other writing, expressing or implying or adapted to imply a threat:

"1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,

"2. To accuse him, or any relative of his, or member of his family, of any crime; or,

"3. To expose, or impute to him or them any deformity or disgrace; or,

"4. To expose any secret affecting him or them," (Penal Code, Sec. 519,) with intent to extort any money or other property from another.

The letter which the defendant is charged with having sent to Clune, contains a threat to expose his disgrace in such a way as to ruin his character and business relations, unless he withdraws his appeal in a certain specified case.

Assuming, as we do, that the right to take and prosecute an appeal, is property within the meaning of the Code, it follows that a threat made for the purpose of inducing an appellant to dismiss an appeal, is a threat made with the intent to extort property from another.

But the point upon which respondent's counsel seems to rely more than upon any other, is that the letter does not purport to be signed by respondent, and the information does not show that he sustained any relation whatever to the firm whose name is subscribed on the letter, or to any member thereof. That is true. But the Code makes it a crime to send or deliver a letter containing such threats with the intent to extort money or other property from another,

"whether subscribed or not," and respondent is distinctly charged in the information with having sent this letter with that intent. Whether he did or not is a question of fact. There is nothing upon the face of the letter which contradicts the charge that he did send it. If it were necessary to charge that he wrote it, the objection that it appears on its face to have been written by some one else would, doubtless, require some further averments in the information.

As the law stands, we think that the charge that the respondent sent a letter containing a threat to expose the disgrace of another, with the felonious intent charged, is sufficient, and that the demurrer should be overruled.

Judgment reversed, with directions to the Superior Court to overrule the demurrer and permit the defendant to plead to the information.

We concur: McKinstry, J., Ross, J., Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed February 1, 1881.]

No. 6554.

OAKLAND GASLIGHT COMPANY, RESPONDENT.

VS.

J. P. DAMERON ET AL., APPELLANTS.

APPEAL FROM ORDER GRANTING NEW TRIAL ON MINUTES OF COURT—STATEMENT NECESSARY. On appeal from an order granting a new trial on the minutes of the Court, the record on appeal must contain a statement; and if it do not, the correctness of the ruling will not be reviewed.

Appeal from the District Court of the Third Judicial District, Alameda County.

C. A. Tuttle and J. P. Dameron, for appellants.

N. Hamilton, for respondent.

By the COURT:

This is an action of ejectment. The defendants had judgment, and a motion for a new trial was made on the minutes of the Court, which was granted. The correctness of the ruling cannot be reviewed on this appeal. Section 661, C. C. P., provides that when the motion for a new trial is made on the minutes of the Court, the judgment roll and a statement, to be subsequently prepared, with a copy of the order, should constitute the record on appeal. There is no statement in this case.

Order appealed from affirmed.

IN BANK.

[Filed February 7, 1881.]

No. 7473.

SAN FRANCISCO GASLIGHT COMPANY, PETITIONER,

VS.

JOHN P. DUNN, AUDITOR, ETC., RESPONDENT.

SUPERVISORS, AUTHORIZED TO FIX PRICE OF GAS, CANNOT DELEGATE THEIR POWER. Where the Board of Supervisors of San Francisco were authorized by statute to fix the price to be paid by the city and county for gas: Held, that it had no power to delegate its power to persons not members of the board, or to alienate its power of final determination.

POWER OF SAN FRANCISCO SUPERVISORS TO FIX PRICE OF GAS BY ADOPTING REPORT OF COMMISSION ON SUBJECT. Where the Supervisors of San Francisco, being authorized to fix the price of gas to be furnished to the city and county, made a contract by which the fixing of the price was referred to a commission, and after the report of the commission the board passed an order fixing the price in accordance with the report: Held, that the price was in effect fixed by the Supervisors.

CONTRACTS OF SUPERVISORS CEDING THEIR LEGISLATIVE POWERS INVALID. A Board of Supervisors, having power to provide for lighting the streets of a city, has power to contract for such lighting; but it cannot make such a contract as will cede its powers or control or embarrass future legislation; and any contract, amounting to a cession of the right of future legislation, or evidently not intended to be authorized, will be invalid.

CONTRACT OF SAN FRANCISCO SUPERVISORS FOR MORE THAN TWO YEARS INVALID. Where an Act of April 13, 1876 (Stats. 1875-6, p. 854), prohibited the Supervisors of San Francisco from making any contract for any purpose for a longer period than two years binding upon the city: Held, that a contract purporting to be for five years was not valid for two years, but was altogether invalid.

POWER OF SAN FRANCISCO SUPERVISORS TO PAY FOR GAS FURNISHED. The Board of Supervisors of San Francisco was authorized to allow and order paid the bill of the San Francisco Gaslight Company for gas furnished for lighting the streets in October, 1879, not on account of any contract previously entered into, but under the general powers of the Board to pay what the gas was reasonably worth.

ALLOWANCE BY SUPERVISORS OF A PROPER CLAIM NOT INVALID ON ACCOUNT OF DEMAND BASED ON INSUFFICIENT GROUND. Where the Supervisors of San Francisco had the power to allow a claim, and did allow it, the fact that the claimant based his demand upon an invalid contract, nothing appearing as to the grounds upon which the Supervisors acted, did not render the allowance invalid; and the Auditor had no discretionary power to reject it.

Petition for mandamus.

R. P. & H. N. Clement, for petitioner.

McKINSTRY, J., delivered the opinion of the Court:

The clause of the contract between the City and County of San Francisco and plaintiff of May (19) 24, 1869, necessary to be recited reads: "Upon the expiration of the term of five years, hereinbefore limited, the party of the first part (unless it shall elect and notify the party of the second part of its election to advertise for proposals as hereinafter provided) shall purchase and take from the party of the second part all the gas required for lighting said city as aforesaid for another term of five years, dating from the expiration of the term hereinbefore limited, and pay therefor at such rates as shall be agreed upon by a majority of a commission to be constituted: One Commissioner to be appointed by the party of the first part, one by the party of the second part, and one by the two appointed."

On the 24th day of February, 1874, the Board of Supervisors were advised by the then City and County Attorney that the contract of May 24, 1869, was not legal and binding upon the city and county "so as to require the purchase of gas from said company during the second and third terms of five years, or either of them, therein mentioned, for the reasons following: * * * Second—The Board of Supervisors have no lawful authority to delegate to persons not members of that Board the power to fix and determine upon the amounts to be paid by the city and county for gas, or to alienate from the Board its power of final determination with respect to such amounts." (Municipal Reports, 1874-5, p. 733.)

We fully concur with the view of the City and County Attorney as above expressed.

We also agree with the same officer that the adoption by order, duly published, of the sums agreed upon by a member of the Board, a representative of the plaintiff and a third person by them selected, is in effect the fixing by the Board of Supervisors of the sums to be paid by the city in a legal and binding manner. In his opinion addressed to the Board February 28, 1876, with reference to the first renewal (so-called) of the gas contract, the City and County Attorney said: "The contract of May 17, 1874, mentioned in resolution 8293 (new series) as the renewal of said contract with the San Francisco Gaslight Company, on May 17, 1874, for a second term of five years is a binding and valid contract, * * * not because of the contract of May 19, 1869, but because what was done on the part of the Board of Supervisors and on the part of the San Francisco Gaslight Company, on or about May 19, 1874, created a new contract, per-

fectly good under the statute, * * * from the time of the proceedings taken at the latter date." (Trans., fol. 141.)

On the 7th day of July, 1879, the following resolution—which was subsequently and on the 18th of the same month approved by the Mayor—was finally passed by the Board of Supervisors:

"Resolution No. 13,725. (New Series.)

"*Resolved*, That the rates to be charged for gas to be supplied to the City and County of San Francisco by the San Francisco Gaslight Company, during the term of five years from the 19th day of May, 1879, as fixed by the Commission composed of J. O. Rountree, J. B. Haggin, and J. O. Eldridge, appointed and acting under and in pursuance of the contract existing between said city and county and said company, be and are hereby accepted, adopted and approved, and the report of said Commission is hereby adopted, ratified and confirmed.

"In Board of Supervisors, San Francisco, July 7, 1879, after having been published five successive days, according to law, taken up and passed by the following vote:

"Ayes—Supervisors Foley, Mangels, Danforth, Rountree, Farren, Acheson, Scott, Haight. Noes—Supervisors Talbert, Smith, Gibbs, Brickwedel.

"(Signed)

JOHN A. RUSSELL, Clerk."

The rates fixed by the "Commission" were before the Board in the report of Supervisor Rountree. The resolution is, of course, to be read as if the report referred to were incorporated in it, and thus read it fixes the rates which the city and county agreed to pay. Thus the "final determination" with respect to the rates to be paid, was exercised by the Board of Supervisors, and not by the "Commission."

Section 74 of the "Consolidation Act" empowers the Board "by regulation or order * * * to provide for lighting of streets," and by Section 71 it is enacted "that the street light fund shall be applied and used in payment for lighting the streets of the city and for the repair of lamp-posts in pursuance of any existing or future contracts of the said city and county." It is not disputed that under these provisions of the charter the Supervisors have power by "order," duly published, to contract for the lighting of the streets. As we construe resolution 13,725 (new series), they did so contract.

It is urged, however, that the Board had no power to make such contract to run for a period of five years.

We entertain no doubt that the power conferred upon the

Supervisors "by resolution or order" to provide "for lighting the streets" includes a power to enter into an appropriate contract, for carrying into effect the major power. The power to provide for lighting the streets has been held, however, to be a governmental power, to be employed by the legislative department of the local government; such as cannot be ceded away, nor used in such manner as shall control or embarrass future legislation. "No legislative body can part with its powers by any proceeding so as not to be able to continue the exercise of them. Such body has no power, even by contract, to control and embarrass its legislative powers and duties." (Cooley's Con. Lim., 205.)

In *East St. Louis vs. Gaslight Company*, the Supreme Court of Illinois said: "We do not think there can be a doubt that the power conferred on the City Council to provide for lighting the streets and provide the means to pay for the same by taxation is legislative power." (See opinion, "Reporter," for July, 1880, and cases therein cited.) It is not to be inferred, however, that a subsequent Board of Supervisors may disregard every contract entered into by their predecessors, or annul every such contract even by formal legislative act. The power of the members of the Board to determine on behalf of their constituencies that it is expedient to secure the lighting of the streets, by a company or individuals, upon certain terms is legislative. But when a contract (which the Board is authorized to make) is entered into between the Supervisors and a company or individuals, the corporation is as much bound by it as is any other person by his contracts. If, however, under pretense of carrying into effect a legislative power conferred, the Board shall enter into such a contract as was evidently not intended to be authorized, or such as shall amount to a cession of the right of future legislation, the contract is invalid. In *East St. Louis vs. Gaslight Company*, it was held that a contract giving to a company the exclusive privilege of lighting that city for thirty years was invalid. But in the absence of an express limitation as to the period of time for which a contract may be made, we would hold, perhaps, that the contract with the plaintiff for five years was not beyond the power of the Supervisors. The exigencies of the present case do not demand a determination of that question. We only say we are not now prepared to declare that such a contract, for five years, must necessarily embarrass the Supervisors, or disable them from performing their legislative or governmental functions. (Dillon Munc. Corp., 61.)

While, therefore, the attempt, by the clause of the con-

tract of 1869, above recited, to transfer to "Commissioners" the power conferred by the charter upon the Supervisors, of determining what rates it might be expedient for the city and county to pay to a gas company five years in advance, is of no force or effect, because the Board had no power thus to cede to others their legislative function (and of this the Supervisors were fully informed by their legal adviser long before the contract of 1879 was entered into by them), it may be assumed, for the purposes of this decision, that the contract of 1879 is valid as an independent contract, unless prohibited by express statutory provision.

An Act of the Legislature was approved April 3, 1876, the first section of which reads as follows:

"If at the beginning of any month any money remains unexpended in any of the funds set apart for maintaining the municipal government of the City and County of San Francisco, and which might lawfully have been expended the preceding month, such unexpended sum or sums may be carried forward and expended by order of the Board of Supervisors in any succeeding month; provided, that said Board of Supervisors shall not hereafter make any contract for any purpose, binding said city for a longer period than *two years*." (Stats. 1875-6, p. 854.)

The proviso is certainly very explicit, and prohibits the making of any contract for any purpose "binding said city for a longer period than two years." If we could hold this language to mean simply that the city should not be bound for a longer period than two years, by any contract which the Supervisors might make, we could command the Auditor to pass the claim as prayed for by petitioner herein, inasmuch as it is for gas furnished during the month of October, 1879—within two years after the contract of 1879 was entered into. It was the unmistakable intention of the Legislature, however, to deprive the Board of Supervisors of the power of entering into any contract which, by its terms, purported to bind the city for any longer period than that named in the proviso. The contract of 1879 was, therefore, one which the Supervisors were not empowered to make, and any claim, based upon such contract, one which the Supervisors had no authority to allow.

But an examination of the record fails to show that the claim presented by the plaintiff, and allowed, audited and approved by the Board of Supervisors, for gas consumed in the month of October, 1879, was based upon the contract of 1869, or the renewal thereof (so called) of 1879. The

claim or demand itself refers to the authority on which it is based as follows:

"The above demand, being authorized by Section 1, Subdivisions 1 and 5 of an Act entitled 'An Act amendatory of an Act entitled an Act to repeal the several charters of the city of San Francisco, to establish the boundaries of the City and County of San Francisco, and to consolidate the government thereof, approved the nineteenth day of April, A. D. 1856,' and as amended by an Act amendatory thereof, approved the eighteenth day of May, A. D. 1861 (6), approved March 26, 1866." (Statutes 1865-6, p. 436.)

The portions of Section 71 of the Consolidation Law thus referred to are: "First, * * * the Board shall, in making said levy of said taxes, apportion and divide the taxes so levied and to be collected and applied to specific funds known as the Corporation Debt Fund * * * Street Light Fund," etc. "Fifth, the Street Light Fund shall be applied and used in payment for lighting the streets of the city and for the repair of lamps and posts, in pursuance of any existing or future contract of the said city and county." As we have seen, there was immediately prior to the action of the Board of Supervisors upon the claim of the plaintiff, no existing contract between the plaintiff and the city and county. But after the claim or demand of plaintiff was presented, "duly verified in the form prescribed by law and the order of the Board," and on the eighth of November, 1879, said claim was referred by the Board of Supervisors to their Street Light Committee, by whom it was approved and endorsed, and on the same day the Board passed to print an authorization on the "Street Light Fund" for the payment of the amount of the claim, which was duly printed for five days thereafter. On the fifteenth of November, 1879, the plaintiff's claim or demand was finally passed and approved by the Board of Supervisors, was approved and signed by the Mayor, was thereafter regularly published, and after such publication, and on the first day of December, 1879, "was taken up in open session by said Board of Supervisors, and by it allowed, passed and ordered paid out of said Street Light Fund."

We have seen that by Section 74 of the Consolidation Act the Board were authorized, "by order," to provide for lighting the streets. The order or ordinance allowing, approving and ordering paid the demand of plaintiff for gas, etc., furnished the city in October, 1879, was regularly published and passed, and was an action of the Board which they were empowered to take, by Sections 71 and 74 of the Consolida-

tion Act. They were not legally bound to allow the claim by reason of the contract of 1869, or of any "renewal" of that contract. But the gas had been furnished the city, and they were fully empowered to provide for its payment such sum as it was worth. They have allowed a claim which they were authorized to allow, in such amounts as the Board should deem reasonable and just. We must presume that they were of opinion that \$22,514.80 was the fair value of the gas furnished and repairs done by plaintiff during the month of October, 1879. Neither the Auditor nor this Court has power to review the judgment of the Supervisors with reference to the amount allowed to plaintiff as the actual value of the gas furnished and repairs made. As we have seen, the city and county is not bound by the contracts of 1869, 1874 or 1879, and no duty is cast upon the Board to audit or allow any claim of plaintiff, according to the rates mentioned in any one of those contracts. But each time a claim is presented by plaintiff, which is allowed in whole or in part by the Board of Supervisors, the latter employ their legislative function or deciding it to be expedient for the city and county to pay at the rates named in the bill, and also enter into a fresh contract to pay the sum allowed. This, as we have seen, they have power to do.

The allegation in plaintiff's petition, that the Board of Supervisors allowed the claim as "based" on the contract of 1869, cannot influence the decision of this case. The allegation is not one of fact upon which an issue could be framed. The Board of Supervisors allowed the claim, and the defendant here, a ministerial officer, has no discretion to reject it; nor has he any authority to refuse to pass it unless the Board exceeded its powers in allowing it. The only facts capable of proof with respect to the allowance of the claim are proved by the record of the proceedings of the Board, which shows only the presentation of the claim and (after proper publication) the votes of the Supervisors allowing it in whole. That the members of the Board mistook the law, or supposed they were bound by an invalid contract when they voted to allow the claim, does not appear from the record of their proceedings, and can never be made to appear legally until some method is invented for proving the unspoken thoughts of men. The presumption is that they did their duty; and this presumption is not weakened by the circumstance that they had before them the opinion of the former legal advisor of the Board that the contract of 1869 expired in 1874, nor by the further circumstance that they

had also before them the Act of 1876, which absolutely prohibited such a contract as was attempted in 1879.

Neither plaintiff nor defendant in the present action is at liberty to aver or admit the motive which induced members to vote for the allowance of the claim, except so far as the motive can be established by their formal and recorded action. The defendant here can only object that the Board had no power to allow the claim, and—without any intimation or suggestion that too much was, in fact, allowed—we say the members of the Board had the power to allow many times the actual value of the gas consumed, if they dared to violate their official duty. They alone had power to determine the real value—their judgment is conclusive—and it is not a function of the Courts to make a contract for them, nor to set aside a contract which they had the capacity to make.

It follows that the authorization upon the Street Light Fund for the payment of the amount allowed was regular.

Let the writ issue as prayed for.

We concur: Myrick, J., McKee, J., Sharpstein, J.

DISSENTING OPINION.

I concur in that portion of the opinion of Mr. Justice McKinstry (and in the reasoning by which it is supported) wherein he holds that the contract relied on by petitioner is one which the Board of Supervisors had no power to make, and therefore no power to allow any claim by virtue thereof. And for that very reason I cannot concur in the judgment. As I read the record, the claim of the petitioner is based on the contract, and its allowance was obtained by virtue of the contract and not otherwise. The petition itself, in effect, so states, and the fact is so declared in the briefs of the counsel for the respective parties. I entertain no doubt that the Board of Supervisors has the power to pass upon the claims of the petitioner for gas furnished the city, and to allow such sums therefor as may be reasonable and just; and that when so allowed, payment of such amounts can be compelled by petitioner. And, further, as said by Mr. Justice McKinstry, that the Board has the power to contract for gas, upon such terms as it may seem proper, for any period not exceeding that limited in the Act of April 3, 1876—to wit, two years.

I dissent from the judgment: Ross, J.

I concur in the foregoing opinion: Thornton, J.

DEPARTMENT No. 2.

[Filed February 11, 1881.]

No. 6560.

ESTATE OF CHARLES S. JOHNSON, DECEASED, PAR-
DON R. JOHNSON, APPELLANT,

VS.

GEORGE H. RICE ET AL., RESPONDENTS.

QUESTION OF CAPACITY OF TESTATOR TO MAKE WILL—CONFLICT OF EVIDENCE. Where on the contest of a will on the ground that a testator was not of sound and disposing mind, there was testimony that for twenty years he had been addicted to the excessive use of intoxicating liquor, and was "a noted drunkard," but there was some evidence that he was of sound and disposing mind; and the Court below found in favor of the proponent: *Held*, that the finding should not be disturbed on appeal.

A DRUNKARD NOT NECESSARILY INCAPABLE OF MAKING A WILL—QUESTION OF FACT. It cannot be said as a rule of law that because a man is a drunkard he is of unsound mind, so as to be incapacitated from making a will. Whether his inebriety has had the effect of rendering him incapable, either permanently or temporarily, covering the time of making the will, is a question of fact for the jury.

ADJUDICATION OF INCOMPETENCY AND GUARDIANSHIP BY PROBATE COURT NOT CONCLUSIVE AS TO INCAPACITY TO MAKE A WILL. Where on the contest of a will executed on December 17, 1877, it appeared that the testator had been by the Probate Court adjudged incompetent and placed under guardianship, and it was claimed that such adjudication was conclusive on the point that he was incapable of making a will: *Held*, under Section 40 of the Civil Code, that the adjudication was, as to lack of testamentary capacity, only *prima facie* evidence, and that the Court below was correct in hearing evidence as to his restoration to capacity at the time the will was made.

WITNESSING OF WILL—KNOWLEDGE OF WITNESS AS TO CHARACTER OF INSTRUMENT BEFORE SIGNING. Where a question arose as to whether a witness to a will knew when he became a witness that it was to a will, and it appeared that the first he knew of it was that the testator came to his place of business and asked him to go and witness his signature, without saying anything about a will; that they then went to the scrivener who had drawn the paper; that testator then and there signed it, and asked the witnesses to witness it; that they thereupon signed as witnesses, the other witness knowing it to be a will; that the scrivener then asked the testator if the paper was his will, and he answered "yes;" and that the whole time occupied in the transaction at the office of the scrivener did not exceed five minutes: *Held*, that the whole interview between testator, scrivener and witnesses was one transaction; that as part thereof the testator declared to the witnesses that the paper was his will, and that the execution, in respect to being before witnesses, was sufficient.

Appeal from the Probate Court of San Mateo County.

Fox & Kellogg, for appellant.

Fox & Ross and *F. E. Spencer*, for respondents.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order of the Court below admitting to probate the will of the deceased, and from the order denying motion for new trial.

1. The question as to the soundness or unsoundness of mind of the deceased was a question of fact upon which there was a conflict of evidence. There was *some* evidence that at the time of the execution of the proposed will he was of sound and disposing mind, notwithstanding other evidence tending to show that for twenty years he had been addicted to the excessive use of intoxicating liquors, and had been for years, as one witness stated, "a noted drunkard." Upon that evidence the Court below found that he was of sound and disposing mind, and there being a substantial conflict in the evidence, it is not our province to disturb the finding. We cannot say, as a rule of law, that because a man is a drunkard, therefore he is of unsound mind. It is a question of fact for the jury or Court below to determine, whether the inebriety has had the effect of rendering his mind unsound, either permanently or temporarily, covering the time of the execution of the alleged will.

2. At the time of the execution of the proposed will, December 17, 1877, the deceased was under guardianship as an incompetent person, under Sections 1763, and following, C. C. P. It is claimed by the appellant, who contested the probate of the will in the Court below, that the action of the Probate Court in adjudging him to be a fit subject for guardianship, had the effect in law of conclusively determining that he was, during the guardianship, incompetent to make a will. Section 40 of the Civil Code, as then in force, read as follows:

"After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined."

This section was amended in 1878, but the amendment does not apply to this case. We are of opinion that under the above section, as it read in 1877, the adjudication of incompetency was, as to lack of testamentary capacity, *prima facie* evidence only, and that the Court below was correct in hearing evidence as to whether the ward was, at the time of the execution of the proposed will, actually restored to capacity.

3. There is some indefiniteness as to the witnessing of the

will, viz., as to whether the witness Wilcox was informed, before he wrote his name as a witness, that he was witnessing a will. The other witness knew from the deceased that the paper was being executed as a will, and he was of opinion that Wilcox was possessed of the same knowledge. Wilcox, however, states in substance that deceased came to his place of business, and asked him to go and witness his signature; that they went together to the office of the scrivener, where the paper had been prepared, and the deceased signed the paper and asked the witnesses to witness it, and they signed as witnesses; that thereupon the scrivener asked deceased if the paper was his will, and he replied "yes;" that the whole time occupied in the transaction at the office of the scrivener did not exceed five minutes. We are asked to hold that this state of facts does not show a proper execution of a will, in that the witness Wilcox did not understand at the moment he wrote his name that he was witnessing the execution of the paper as and for a will. We are of opinion that the whole interview, as had between the deceased, the witnesses and the scrivener was one transaction; and that, as a part of that transaction, that the deceased did declare to the witnesses that the paper was his will. Before the parties separated, and while the paper was there before them, and was under consideration, indeed, before any act had taken place after the signing, the declaration was made. We think this was a substantial compliance with the statute. (*Vaughan vs. Burford*, 3 Bradf. 78; *Jackson vs. Jackson*, 39 N. Y. 153.)

Judgment and order affirmed.

We concur: Sharpstein, J., Morrison, C. J.

IN BANK.

[Filed January 20, 1881.]

No. 10,489.

THE PEOPLE, RESPONDENT,
VS.

GEORGE M. MESSERSMITH, APPELLANT.

CRIMINAL LAW—CHARGE—READING AN ERRONEOUS DECISION WITHOUT POINTING OUT ITS ERROR. Where on a murder trial, on a defense of insanity, the Court charged the jury by reading from several well-settled authorities upon the subject, but also from a decision of Lord Mansfield, saying that insanity must be "proved beyond all doubt," without pointing out its inconsistency with the rule as established in California: *Held*, error.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

—, for appellant.

A. L. Hart, Attorney-General, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The Court incorporated in its charge to the jury an extract from the opinion of Lord Mansfield in *Billingham's case*, which, it is conceded, does not state the true rule as to the evidence required to prove insanity as a defense to a criminal charge. In this connection the Court read extracts from opinions delivered by this Court upon that subject, and told the jury that the principles of law applicable to the question were clearly laid down in *The People vs. Meyers*, 20 Cal. 518, in which it was held that "the question of the defendant's insanity must be proved to the satisfaction of the jury by a preponderance of evidence."

To the professional mind the discrepancy between Lord Mansfield's view and that of this Court upon that question might become apparent upon a careful inspection of the two extracts. There is nothing to indicate, however, that the Court in the hasty preparation of its charge detected any inconsistency between them. If it had, one or the other undoubtedly would have been omitted. And if the Court did not discover the discrepancy, it could not reasonably be expected that the jury would.

It is urged by the prosecution in this case, as it was in *The People vs. Valencia*, 43 Cal. 552, and *The People vs. Wong Ah Ngow*, No. 10,436, that the charge as a whole is correct, i. e., that the jury, after being told that insanity need only be proved by a preponderance of evidence, would necessarily infer that Lord Mansfield erred in saying that "it must be proved beyond all doubt," or rather that the rule had been changed since his time. What the jury did or did not infer can never be known. Viewed in the most favorable light, the tendency of the charge was to confuse the jury, who, however intelligent, cannot be presumed to have been equal to the task of carefully discriminating between the views of Lord Mansfield and those of this Court, and of adopting the latter's in preference to the former's. This is the only exception which appears to have been well taken.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., Myrick, J., Ross, J., McKinstry, J.

IN BANK.

[Filed January 25, 1881.]

No. 10,583.

THE PEOPLE, RESPONDENT,

VS.

JOSEPH CARLTON, APPELLANT.

CRIMINAL LAW—PREVIOUS CONVICTION MAY BE CHARGED BY INFORMATION, AND WHEN ADMITTED NEED NOT BE TRIED. Where, upon an information for petit larceny, and a previous conviction for a similar offense, defendant pleads "not guilty of offense charged in the information," but as to the prior conviction, "that it is true;" and it was claimed that the provisions of the Penal Code as to previous conviction do not apply, except in prosecutions by indictment, and that the question of prior conviction should have been submitted to and passed upon by the jury: Held, that neither claim could be sustained.

PROVISIONS OF PENAL CODE RELATING TO PROSECUTION BY INDICTMENT APPLICABLE TO PROSECUTIONS BY INFORMATION. Though the Penal Code, in providing for a greater punishment in case of previous conviction for a similar offense, and for charging such previous conviction, speaks only of such charge being made in an indictment, yet, as the new Constitution provided that offenses theretofore prosecuted by indictment might be prosecuted by information, and as the Legislature by various amendments of the Code in 1880 manifested its intention to make its provisions equally applicable to prosecutions by information or indictment: Held, that a charge of previous conviction could be made in an information as well as in an indictment, and that the same rules of procedure applied.

Appeal from the Superior Court of San Joaquin County.

S. L. Terry, for appellant.

A. L. Hart, Attorney-General, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The appeal in this case is taken upon the judgment roll alone, and the ground relied upon for a reversal is, that the punishment was in excess of that authorized by law. The prosecution was by information, and the conviction was of the crime of petit larceny. The information charged a previous conviction of a similar offense, and the judgment of the Superior Court was "that the said Joseph Carlton be punished by imprisonment in the State Prison of the State of California for the term of four years."

Section 667 of the Penal Code provides that "every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State Prison, commits any

crime after such conviction, is punishable as follows: * *

"3. If the subsequent conviction is for *petit larceny*, or for an attempt to commit an offense which, if perpetrated, would be punishable in the State Prison, then such person is punishable by imprisonment in such prison not exceeding five years."

The record shows that upon the arraignment of the defendant he pleaded "not guilty of the offense charged in the information, and as to the prior conviction "that it is true." On this appeal two points are made on behalf of the appellant: First, that the provisions of the Penal Code on this subject do not apply, except in prosecutions by *indictment*; and second, that the question of prior conviction should have been submitted to and should have been passed upon by the jury. We will first consider the second point.

By Section 1158 of the Penal Code it is provided that: "Whenever the fact of a previous conviction of another offense is charged in an indictment, the jury, if they find a verdict of guilty of the offense for which he is indicted, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction;" and Section 1093, of the same Code, provides that, "if the indictment be for a felony, the clerk must read it and state the plea of the defendant to the jury, and in cases where the indictment charges a previous conviction, and the defendant has confessed the same, the clerk, in reading such indictment, shall omit therefrom all that relates to such previous conviction."

It is clear from the foregoing sections, that it was not necessary for the jury to pass upon the question of *previous conviction*, for the Code provides that when the defendant has confessed the same, that part of the indictment that charges a previous conviction shall not be read to the jury.

The fact of a previous conviction was set out in the information in accordance with the provisions of Section 969 of the Penal Code, and the only question which remains to be considered is the first point presented on behalf of appellant. The Penal Code speaks of an *indictment* only, and it is therefore contended that its provisions do not apply to a prosecution by *information*. Section 8, Article I, of the Constitution declares that "offenses heretofore required to be prosecuted by *indictment*, shall be prosecuted by information after examination and commitment by a magistrate, or by *indictment* with or without such examination and commitment;" and by the Act of April 9, 1880, it is provided that "Section six hundred and eighty-two of the Penal Code is amended so as to read as follows:

"Every public offense must be prosecuted by indictment or information," and by the same Act a new section was added to the Penal Code: "The following is added as a new section to said Code, to be known as section eight hundred and nine:

"When a defendant has been examined and committed, as provided in Section eight hundred and seventy-two of this Code, it shall be the duty of the District Attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the name of the people of the State of California, and subscribed by the District Attorney, and shall be in form like an indictment for the same offense." (Amdts. 1880, Penal Code, p. 10.)

The last two sections are found in the Act of April 9, 1880, which is entitled "An Act to amend Sections 682" (and other sections, naming them), "and to repeal Sections 969 and 1025 of the Penal Code, and to add a new section thereto, to be known as Section 809, to provide for prosecution by information, and to adapt the provisions of said Code thereto." (*Id.*)

Other sections of this amendatory Act are the following:

"Section eight hundred and eighty-eight of said Code is hereby amended so as to read as follows:

"All public offenses triable in the Superior Courts must be prosecuted by indictment or information, except as provided in the next section."

"Section nine hundred and forty-nine of said Code is hereby amended so as to read as follows:

"The first pleading on the part of the people is the indictment or information."

There are other sections applicable to this subject, but the foregoing quotations will show that it was the intention of the Legislature to make the provisions of the Penal Code equally applicable to prosecution by information and indictment. After the examination contemplated by Section 809 has been had, it is left to the discretion of the District Attorney to prosecute either by indictment or information; and whether the one form or the other is pursued, the fact of a previous conviction may be set forth. If the defendant pleads not guilty to such charge, the issue must be tried by a jury; but, if he pleads guilty thereto, as he did in this case, no such trial is required under the provisions of the law in existence at the time the defendant in this case was tried and convicted.

Judgment affirmed.

We concur: Sharpstein, J., Myrick, J., Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed January 21, 1881.]

No. 5815.

THE PEOPLE, EX REL. THE COMMISSIONERS OF TRANSPORTATION, RESPONDENT,

VS.

THE CENTRAL PACIFIC RAILROAD COMPANY,
APPELLANT.

MANDAMUS—JUDGMENT ON MERE DEFAULT CANNOT BE RENDERED. Where on an application to a District Court for a writ of mandamus, defendant answered and plaintiff demurred to such answer, and the demurrer being sustained and defendant declining to award, his default was entered, and a peremptory writ thereupon ordered to issue: *Held*, that under Section 1088 of the Code of Civil Procedure, the writ of mandamus could not be granted on a mere default; that the cause should have been heard, whether the adverse party appeared or not; and that the judgment under the circumstances was erroneous.

MANDAMUS—REPEAL OF ACT UPON WHICH WRIT PREDICATED PENDING APPLICATION—DISMISSAL OF PROCEEDINGS. Where the Act of April 3, 1876 (Stats. 1875-6, p. 783), requiring railroad corporations to furnish certain information to the Commissioners of Transportation, was repealed without exception or reservation by the Act of April 1, 1878 (Stats. 1877-8, p. 986), whereby the Commissioners of Transportation ceased to exist; and it appeared that an application for mandamus to compel the furnishing of such information was pending on appeal from a judgment ordering a writ to issue at the time of such repeal: *Held*, that the proceedings should be dismissed.

Appeal from the District Court of the Third Judicial District, San Francisco City and County.

S. W. Anderson, McAllister & Bergin and S. M. Wilson, for appellant.

D. J. Murphy, H. H. Haight and Stephen H. Phillips, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The action is by mandamus, to compel the defendant under the Act of April 3, 1876, to furnish to the Commissioners of Transportation, created by that Act, certain information. (Stats. 1875-6, p. 783.)

The judgment appealed from is as follows: "In this action the plaintiff's demurrer to the defendants' answer having been

by this Court sustained, and the said defendants having failed to appear and amend their answer within the time allowed by law, therefore it is ordered that the default of the defendants, The Central Pacific Railroad Company, be entered for failure to amend their answer, and that a peremptory writ of mandate issue."

The Code of Civil Procedure (Section 1088) provided, *** "The writ (of mandate) cannot be granted by default. The case must be heard by the Court whether the adverse party appear or not." The judgment must therefore be reversed.

The Act of April 3, 1876, was repealed (without exception or reservation) by the tenth section of the third chapter of the Act of April 1, 1878 (Stats. 1877-8, p. 986); and, from the date last mentioned, the Commissioners of Transportation—to whom the judgment of the District Court commanded defendant to report—ceased to exist. It follows that the proceeding should be dismissed.

Judgment reversed, and Court below directed to dismiss the action.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 2.

[Filed February 5, 1881.]

No. 5822.

CORNWALL vs. DAVIS.

By the COURT:

On the authority of *Wakelee vs. Davis*; No. 5817, and cases there cited, the order is reversed.

DEPARTMENT No. 2.

[Filed February 5, 1881.]

No. 5816.

MACPHERSON vs. DAVIS.

By the COURT:

On the authority of *Wakelee vs. Davis*, No. 5817, and cases there cited, the order is reversed.

IN BANK.

[Filed January 25, 1881.]

No. 10,569.

THE PEOPLE, RESPONDENT.

VS.

FRANCISCO JOSE FURTADO, APPELLANT.

CRIMINAL LAW—HOMICIDE—TESTIMONY SHOWING RELATIONS OF WITNESS TOWARDS DECEASED AND DEFENDANT ADMISSIBLE. Where in a murder case a witness for the prosecution was asked by defendant on cross-examination if it had not been understood that he was to meet deceased on his ranch, on the morning of the homicide, and assist him in driving the defendant and his sheep therefrom, and on objection for irrelevancy and immateriality the question was ruled out, and defendant excepted: *Held*, that the defendant had a right to show the relations, if any, which the witness sustained towards the deceased and the defendant respectively; that the question was calculated to draw out testimony showing them; and that its exclusion was *error*.

PROPER INQUIRIES ON CROSS-EXAMINATION AS TO RELATIONS AND FEELINGS OF WITNESS TOWARDS PARTIES. It is proper on cross-examination to put such questions as will bring out the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and his prejudices.

Appeal from the Superior Court of San Benito County.

L. Quint, Briggs & Hawkins and *B. B. McCroskey*, for appellant.

A. L. Hart, Attorney-General, for respondent.

SHARPSTEIN, J., delivered the following opinion:

Manuel Francisco, a witness who was called and examined on behalf of defendant, was asked, upon cross-examination by the District Attorney, if, in the month of August, 1879, on the streets of Hollister he, witness, had a conversation with one Harris. Witness answered "Yes." The District Attorney then put the following question to the witness: "Did he tell you, in the presence of McCloskey, that Mr. Payne was going to sue you for damages, for having been on his range that year?" To which the witness answered, "No, sir; he did not. He told me Payne was going to give me fits." The prosecution called Thomas McCloskey as a witness in rebuttal, who testified that he was present at a conversation between the defendant and Harris, in the streets of Hollister, in August, 1879. Witness was then asked by the District Attorney, this question: "Did you

hear Mr. Harris say to Manuel Francisco that Mr. Payne was going to sue him for damages for his sheep being on Payne's ranch?" The question was "objected to by defendant, on the grounds that it is irrelevant and immaterial, and that the proper foundation has not been laid as to particulars of time and place—stating that it was heard in the town of Hollister without designating the part of town is insufficient." The objection was overruled and the defendant excepted. After which the witness answered that he heard such a conversation between the defendant and Harris.

"A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried." (*People vs. Devine*, 44 Cal. 458.) How a statement made by Harris to Francisco—the defendant not being present—could be relevant to the issue being tried in this case, is certainly not apparent.

Two of the witnesses for the prosecution—Pogne and Hilburn—were severally asked on their cross-examination, if it was not understood that they were to meet Payne on his ranch on the morning of the homicide, and to assist him in driving the defendant and the sheep from both ranges—Payne's and Pogne's father's. The question was objected to as being irrelevant and immaterial, and the objection was sustained, defendant excepting.

If, by means of cross-examination, an opportunity is afforded of bringing out "the situation of a witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination, and prejudices" (1 Greenleaf Ev. 446), it would seem that a witness for the prosecution, on his cross-examination, in a case of murder, might properly be asked, whether he had agreed to be present and to aid the deceased in the expulsion of the defendant, who committed the homicide while an attempt was being made to expel him from premises claimed by the deceased. The defendant had a right to have that question answered, and to have the jury give it such weight as they might think it entitled to. The question whether the witness had a right to participate in the expulsion of the defendant is quite immaterial, as the object of the question was to draw out a statement which would enable the jury to determine what relations, if any, the witnesses sustained toward the deceased and the defendant respectively.

If these rulings were erroneous, defendant must be presumed to have been injured by them, unless it clearly and affirmatively appears that he was not. And it follows that the judgment and order denying a new trial should be reversed. (*Leonard vs. Kingsley*, 50 Cal. 628.)

If District Attorneys entertain doubts as to the admissibility of evidence, they ought not to insist upon its introduction on behalf of the people, or to object to its introduction on behalf of defendants. The administration of justice might be greatly facilitated by an observance of this rule.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., Morrison, C. J.

I concur in the judgment on the ground last discussed by Mr. Justice Sharpstein: Ross, J.

DEPARTMENT No. 2.

[Filed February 1, 1881.]

No. 7291.

LA SOCIETE FRANCAISE, ETC., RESPONDENT,

VS.

ELIZABETH F. SELHEIMER, APPELLANT.

PRACTICE ON APPEAL—IMMATERIAL POINTS WILL NOT BE DECIDED. Where, in an action to foreclose a mortgage, a subsequent purchaser of the premises, who had been made a party defendant, set up in her answer a combination between the mortgagor and mortgagee to misrepresent the value of the property, whereby she was induced to give more than it was worth, and the Court found against the alleged combination: *Held*, on appeal, that the Court would not inquire into the question as to whether the answer set up a ground of relief or not.

SUBMISSION OF ISSUES TO JURY IN EQUITY ACTIONS ENTIRELY DISCRETIONARY. In an equity action, such as foreclosure of a mortgage, it is entirely within the discretion of the Court to grant or refuse a demand for a submission of the issues raised to a jury; and a refusal to do so is not error.

FORECLOSURE—WHEN APPOINTMENT OF RECEIVER PROPER. Section 564 of the Code of Civil Procedure authorizes the appointment of a receiver in an action to foreclose a mortgage, when it appears that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.

Appeal from the Superior Court of the City and County of San Francisco.

James B. Townsend, for appellant.

John S. Stanly, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The plaintiff brought an action to foreclose a mortgage executed by one B. J. Shay; and the appellant, who purchased the mortgage premises from Shay, subsequently to the execution of the mortgage, was made a party defendant for the purpose of having her equity of redemption foreclosed. She answered and alleged, among other things, that the transaction between Shay and the plaintiff was not a real loan, but that the money which Shay obtained from the plaintiff was advanced by it to him in order that he might purchase the property for the plaintiff, and then sell it for a much larger sum than he otherwise could, by reason of the plaintiff having lent so large a sum upon it. And the appellant alleges that she was induced, by reason of representations made by plaintiff and Shay, to purchase said premises at a price greatly in excess of their real value. It appears that the value of the property at the date of her purchase was, in fact, less than the sum for which it was mortgaged.

It is not necessary for this Court to determine whether the allegations of appellant's answer, if uncontradicted, would entitle her to any relief, because the Court has found directly against her upon the *gravamen* of her complaint. The findings in substance are that the relations between Shay and the plaintiff were simply those of borrower and lender, and that the latter never had any other interest in the premises than that of mortgagee.

Appellant demanded a submission of the issues raised by her answer to a jury, which was refused. Nothing is better settled in this State than that it is entirely within the discretion of the Court to grant or refuse such a demand in an action in equity. And this proceeding, so far as it affects appellant, is purely one in equity. She was made a defendant in order that her equity of redemption might be foreclosed, and for no other purpose.

The objection that the Court appointed a receiver of the rents and profits of the premises, during the pendency of the action, is answered by the Code of Civil Procedure, which authorizes the appointment of a receiver where it appears, as it did in this case, "that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." (C. C. P., 564.)

We are unable to discover anything in this case which distinguishes it from the ordinary action of foreclosure in which subsequent purchasers are made parties for the sole purpose of having their equity of redemption foreclosed.

Judgment affirmed.

We concur: Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed February 11, 1881.]

No. 6618.

CHARLES E. PICKETT, APPELLANT,

VS.

WILLIAM T. WALLACE ET AL., RESPONDENTS.

JURISDICTION OF SUPREME COURT TO PUNISH FOR CONTEMPT AGAINST ITSELF—
No ACTION THEREFOR. The Supreme Court has jurisdiction to adjudicate and punish for a contempt committed against itself, and no action will lie against the Justices for their proceedings in such a case.

JUDGES NOT LIABLE TO CIVIL ACTIONS FOR THEIR JUDICIAL ACTS, EVEN WHEN ALLEGED TO HAVE BEEN DONE CORRUPTLY. Judges of Courts of record of Superior or general jurisdiction are not liable to civil action for their judicial acts, even when the acts are in excess of their jurisdiction, and are alleged to have been done corruptly and maliciously.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

The plaintiff one morning at San Francisco, as the Supreme Court was convening, mounted the bench and assumed the seat of Justice Crockett, claiming that that Justice was not entitled to it. He had to be ejected forcibly. The Court afterwards adjudged him guilty of contempt, and punished him by imprisonment in the county jail. After his release, he commenced this action against the defendants, the then Justices of the Court; and proceedings were had as stated in the opinion.

Charles E. Pickett, for appellant.

Delos Lake and Wilson & Wilson, for respondents.

By the COURT:

Defendants demurred to the complaint; the demurrer was sustained, and plaintiff failing to amend, judgment went for defendants. Plaintiff appealed.

The complaint contains two counts. In each count the acts complained of were committed while the defendants were sitting as the Supreme Court of this State. In substance the complaint is that the defendants, sitting as a Court, knowing that he had not committed a contempt, and not having acquired jurisdiction over his person, falsely, willfully and maliciously adjudged the plaintiff guilty of contempt, and ordered his imprisonment. The plaintiff asked judgment against defendants for \$100,000 damages.

We are not aware of any principle upon which this action

can be maintained. There is no question but that the Supreme Court of this State had jurisdiction to adjudge as to contempts and to punish therefor. It therefore had jurisdiction of the subject-matter. In the recent case of *Turpen vs. Booth*, opinion filed September 30, 1880, we had occasion to consider a case similar to this in principle, and in which we referred to the decision of the Supreme Court of the United States in *Bradley vs. Fisher*, 13 Wall. 335, where it was held that Judges of Courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when the acts are in excess of their jurisdiction, and are alleged to have been done corruptly and maliciously.

We are of opinion that the complaint shows upon its face that plaintiff had no cause of action against the defendants, and that the demurrer was properly sustained.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed January 31, 1881.]

No. 6599.

D. HARNEY, APPELLANT.

VS.

GEORGE H. PORTER ET AL., RESPONDENTS.

WAIVING VERIFICATION OF ANSWER TO SWORN COMPLAINT DOES NOT WAIVE SPECIFIC DENIALS. A stipulation waiving verification of an answer to a sworn complaint is not a waiver of the effect of the verification of the complaint, and if such answer does not contain any specific denial, it is insufficient.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

J. M. Wood, for appellant.

Wm. Leviston, for respondent.

By the COURT:

The complaint in this cause was verified. The answer was a general denial only. Service of the answer was admitted by plaintiff's attorney, and "verification thereof waived." The Court below held the answer sufficient. It is here contended that there was a waiver of the effect of the verification of the complaint, and that the answer need not contain any specific denial.

We think the answer was insufficient.

Judgment reversed and cause remanded.

IN BANK.

[Filed January 31, 1881.]

No. 6667.

THE PEOPLE EX REL. BOARD OF STATE PRISON
DIRECTORS, APPELLANTS,

VS.

M. MILES ET AL., RESPONDENTS.

A COUNTER CLAIM CANNOT BE SET UP AGAINST THE STATE—MODIFICATION OF JUDGMENT ON REHEARING. Where, in a suit by the people of the State against certain defendants, one of them set up a counter claim, and the Court below rendered judgment against the plaintiff and in favor of the counter claim; and on appeal such judgment on the counter claim was reversed and the cause remanded for a new trial: *Held*, on rehearing, it appearing that the only question involved on the appeal was as to whether a counter claim could be set up against the State, and the decision being in the negative, that the judgment of the Supreme Court should be so modified as to strike out the direction for a new trial, and to order judgment in accordance with the decision.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

Jo. Hamilton and *P. Dunlap*, for appellants.

N. Green Curtis, *T. J. Clune* and *D. W. Welty*, for respondents.

By the COURT:

Respondents' petition that this cause be heard in bank calls to our attention the fact that the Attorney-General confined himself (in his points) to the discussion of the proposition that the judgment against the State was erroneous and against law, because "the law of set-off is not applicable to demands by the State against an individual." The only additional point made by assistant counsel for the people was that there was no assignment of the counter claim or set-off, alleged in favor of defendant Miles, to the defendant Holmes. Our own examination of the record has not discovered any error, except that the Court below attempted to give judgment against the State. Under these circumstances, the judgment of Department One should be modified.

It is ordered, adjudged and decreed that the judgment of Department One of this Court be modified by striking therefrom that portion thereof which orders a new trial herein,

and by inserting instead thereof that the Court below be directed to enter a judgment herein in favor of defendant Holmes and against the plaintiff that plaintiff has no cause of action against defendants, or either of them, without costs.

Let the remittitur be stayed for ten days from date.

DEPARTMENT No. 1.

[Filed February 7, 1881.]

No. 6931.

THE PEOPLE EX REL. THE ATTORNEY-GENERAL,
APPELLANT,

VS.

SHERROD WILLIAMS ET AL., RESPONDENTS.

RECLAMATION DISTRICTS PUBLIC CORPORATIONS. It is settled by various decisions in this State that a Reclamation District is a public corporation.

LEGAL EXISTENCE OF RECLAMATION DISTRICT No. 3. In an action instituted by the State for the purpose of obtaining a judgment to the effect that Reclamation District No. 3 had no legal existence, and that its trustees were usurpers, where there was a judgment in the Court below in favor of the trustees: *Held*, that such judgment should not be disturbed.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

A. L. Hart, Attorney-General, *J. H. McKune* and *Haymond & Allen*, for appellant.

G. W. Gordon, *T. H. Williams* and *W. C. Van Fleet*, for respondents.

By the Court:

It must be considered as settled in this State by the cases of *Dean vs. Davis*, 51 Cal. 409; *People vs. Reclamation District No. 108*, 53 Cal. 346, and other cases in this Court, that a reclamation district is a public corporation.

The main purpose of the present action is to obtain a judgment to the effect that Reclamation District No. 3 was not legally created and has not any legal existence, and that the defendants, Williams and others, usurp the powers of trustees, etc. The Court below found in favor of the defendants, and on the authority of *Dean vs. Davis* and *People vs. Reclamation District No. 108*, *supra*, we affirm the judgment and order.

DEPARTMENT No. 2.

[Filed February 15, 1881.]

No. 6717.

HOME SECURITY BUILDING AND LOAN ASSOCIATION OF ALAMEDA COUNTY, RESPONDENT,

VS.

HENRY W. GEORGE ET AL., SAMUEL ELMORE,
APPELLANT.

PRACTICE ON APPEAL.—DEFENDANT APPELLANT CONFINED TO POINTS OF DEFENSE IN COURT BELOW. Where in an action against a principal and his sureties on a bond, the principal pleaded a set-off, in which pleading the other defendants did not unite, and after judgment against them one of the sureties appealed: *Held*, that such appellant, as he did not unite in making the defense in the Court below, could not be heard in relation to it in the appellate Court.

Appeal from the District Court of the Third Judicial District, Alameda County.

This was an action against Henry W. George, as principal, and Samuel Elmore, E. N. Blasdell, Joseph Smith, J. L. Fernandez, F. Leonhard and W. J. Stratton, as sureties on a bond, given by George as treasurer of the plaintiff, to recover \$1,929.85, alleged to have been wrongfully and illegally converted by George as such treasurer. Defendants answered, denying the conversion, and also set up by way of cross-complaint that plaintiff was indebted to George in various amounts exceeding in the aggregate the amount claimed by plaintiff; but on demurrer the cross-complaint was held insufficient.

The judgment was in favor of the plaintiff for the full amount of its claim, with interest and costs.

Samuel Elmore, one of the sureties, was the only defendant that appealed.

McElrath & Eells, for appellant.

H. A. Leake, for respondent.

By the COURT:

There is no error in the case as presented in the transcript. Conceding that any one of the sureties might have had the benefit of the set-off pleaded by their principal if they had united with him in pleading it, neither of them did so unite. The principal did not appeal. Only one of the sureties appealed, and as he did not unite in making the defense in the Court below, he cannot be heard in relation to it here.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed February 11, 1881.]

No. 6574.

J. HOWARD SMITH, RESPONDENT,

VS.

J. B. FARGO ET ALS., APPELLANTS.

COMMON LAW BOND ON RELEASE OF ATTACHMENT VALID. Though a bond given to procure the release of property from attachment do not conform to the provisions of the statute relating to undertakings in such cases, yet, if it conform to the principles of the common law, a recovery may be had thereon, as upon a common law bond.

STATUTORY UNDERTAKING WHEN INDISPENSABLE. Where a statute requires a bond to be executed in a particular form and not otherwise, no recovery can be had on a bond professedly taken under the authority of the Act if it does not conform to it; but if the statute merely prescribes a form, without making a prohibition of any other, a bond which varies from it may be good at common law.

RECITALS IN BONDS CONCLUSIVE AGAINST OBLIGORS. In an action against the sureties on a bond, copied in the complaint: *Held*, that the recitals in the bond were conclusive against the defendants, and need not be specially averred in the complaint or proved on the trial.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

G. F. & W. H. Sharp, for appellants.

J. Howard Smith, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the 13th day of August, 1875, one de Greayer brought an action in the Fourth District Court against W. J. Smith to recover the sum of \$4,198, and procured an attachment to be issued against the property of the defendant Smith. On the 18th day of August, 1875, Smith appeared in the action, and applied for a discharge of the attachment, whereupon the defendants in this case executed and delivered to de Greayer the undertaking sued upon. The undertaking recites that the action of de Greayer against Smith has been commenced, that an attachment has been issued against the property of Smith, and that such property has been attached by the Sheriff under the writ: "And whereas the said defendant is desirous of having said property released from said attachment: Now, therefore, we, the undersigned residents and freeholders in the City and County of San Francisco, in consideration of the premises, and also in consideration of the release from said attachment of the property attached as above mentioned, do hereby jointly and severally undertake, in the sum of six thousand dollars gold coin, and

promise that in case the plaintiff recover judgment in the action, the said defendant will, on demand, pay to the plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs; the same to be paid in United States gold coin, if so required by the terms of the judgment." The action of *De Greayer vs. Smith* was prosecuted to judgment in favor of the plaintiff, demand was duly made of Smith and his sureties for payment thereof, and payment was refused. The judgment was assigned to the plaintiff, and he brought this action upon the undertaking. Judgment was entered in his favor in the Court below, and from that judgment this appeal was prosecuted.

Appellant makes three points upon this appeal:

1. That an action cannot be maintained upon the undertaking until execution is returned unsatisfied in whole or in part, in the attachment suit.

2. There being no levy of the attachment, there was no consideration for the undertaking. The levy should have been averred.

3. The undertaking was not according to law.

In support of the first point, appellant relies upon Section 552 of the Code of Civil Procedure; but that section has no application to the case, for the reason that the undertaking was not given pursuant to Section 540 or Section 555 of the Code. It was not a statutory undertaking, and cannot be held valid and binding as such. It was a common law bond, and if binding upon the sureties it must be so, under the principles of the common law. This question was before the Court in the case of *Palmer vs. Vance*, 13 Cal. 553, and it was there said: "The paper sued on is not a statutory undertaking; but being founded upon a sufficient consideration, is valid as a common law obligation for the payment of money. A bond taken by the Sheriff is not void for want of conformity to the requirements of the statute, which, while prescribing one form of action does not prohibit others; and a bond given voluntarily upon the delivery of property is valid at common law." In the case of *Whitsett vs. Womack*, 8 Alabama, 466, the Court says: "Where a statute requires a bond to be executed in a particular form, and not otherwise, no recovery can be had on a bond professedly taken under the authority of the Act, if it does not conform to it; but if a statute merely prescribes the form, without making a prohibition of any other, a bond which varies from it may be good at common law." (See also *Seawell vs. Cohen*, 2 Nev. 311.)

The bond declared upon was given voluntarily upon a sufficient consideration, and was good at common law, according to the above authorities.

The second point is not well taken. The bond recites that the property of the defendant Smith had been seized by the Sheriff under the writ of attachment, and that the bond was given for the purpose of procuring the release of such property from the levy. In the case of *McMillan vs. Dana*, 18 Cal. 339, it was held that recitals in bonds are conclusive of the facts stated; and in *Bewers vs. Beck et al.*, 2 Nevada, 150, it is said that "whatever the obligor recites in a bond to be true may be taken as true against him, and need not be averred in a complaint on such bond, or proved on the trial."

But the complaint in this case does aver that the attachment was levied on the property of the defendant Smith, and the fact was found by the Court. The finding is: "That on the 13th day of August, 1875, an action was commenced in the District Court of the Fourth Judicial District of the State of California, wherein S. de Greayer was plaintiff and W. J. Smith was defendant, and a writ of attachment was thereupon duly issued against and levied upon the property of said defendant, W. J. Smith."

The third point has already been answered in this opinion.

We are of the opinion that none of the points raised by appellant are well taken, and the judgment appealed from is therefore affirmed.

We concur: Myrick, J, Thornton, J.

IN BANK.

[Filed February 11, 1881.]

No. 7168.

J. DE BARTH SHORB ET AL., RESPONDENTS,

VS.

PRUDENT BEAUDRY ET AL., APPELLANTS.

THE SUPREME COURT, IN A PROPER CASE, WILL FRAME THE DECREE TO BE ENTERED IN THE COURT BELOW. Where in a complicated equity case the Supreme Court ordered a modification of the judgment of the Court below, and it was deemed difficult to carry out the order: *Held*, on application therefor, that a decree, to be entered in the Court below, would be framed by the Appellate Court.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

This cause was first decided in the Supreme Court on December 3, 1880, when it was ordered that it should be remanded to the Superior Court of Los Angeles County with directions to said Court to modify its judgment so as to accord with the opinion then delivered, and the judgment so to be modified was affirmed.

Subsequently a petition was filed asking that a decree be framed by the Supreme Court, which was granted. Afterwards forms of decree were filed by both parties; and the result was the following orders adjudicating the decree to be filed in the Court below.

Howard, Brosseau & Howard, for appellants.

Glassell, Smith & Smith, for respondents.

By the COURT:

In the above entitled action it is ordered and adjudged that the Superior Court of the County of Los Angeles, to which this cause is remanded, make and enter the following decree in the place and stead of the decree heretofore entered in said action:

"Upon the record herein, and pursuant to the judgment and decision of the Supreme Court in that behalf, it is hereby ordered, adjudged and decreed that the entire capital stock of the defendant corporation, the Lake Vineyard Land and Water Association, be sold in lots of 100 shares each by [Here insert the name of whoever may be appointed Commissioner by said Superior Court] who is hereby appointed a Commissioner for that purpose, at public auction, to the highest bidder for cash, after twenty days public notice in at least one newspaper printed and published in said County of Los Angeles. That any of the parties to this action may bid at such sale and become purchasers thereat, and that said Commissioner, on receipt of the purchase money for any lot or lots of said stock, execute and deliver to the purchaser or purchasers thereof, at said sale, a good and sufficient deed of conveyance, transfer and assignment of the number of shares of said capital stock of said corporation so purchased by such purchaser or purchasers; said deed so made by said Commissioner shall operate to transfer to the purchaser or purchasers receiving the same a good and sufficient title in and to all the said capital stock purchased by such purchaser or purchasers.

"And it is further ordered, adjudged and decreed that said corporation and the proper officers thereof, upon presentation of said deed or deeds of conveyance, transfer and assignment, issue to the said purchaser or purchasers, or to such

other person or persons as the said purchaser or purchasers shall designate, a proper certificate or certificates for all the said shares of its capital stock so purchased and conveyed to such purchaser or purchasers, and make suitable and proper entries in that behalf upon the books of said corporation that the said persons to whom said certificates are issued shall appear to be the stockholders of said corporation upon said books.

"And it is further ordered, adjudged and decreed that out of the proceeds of the said sale the said Commissioner first reimburse himself for all the costs and expenses of the sale; second, pay to the plaintiffs the amount of their costs herein taxed at \$168; and third, pay the plaintiffs the further sum of sixty-one thousand three hundred and sixty-six 50-100 dollars (\$61,366.50), being the amount advanced and contributed by B. D. Wilson in his lifetime to the partnership set forth in the complaint, in excess of the amount contributed by his co-partners, with legal interest thereon from the twentieth day of July, A. D. 1875, less the sum of _____, received by the plaintiffs herein from the defendant corporation; or so much thereof as the said proceeds will pay; and fourth, that he divide the balance, if any, equally between the plaintiffs and the defendant, Victor Beaudry."

And it is further ordered that the blank space between the words "of" and "received" in lines 17 and 18 of page 3 of the above form of decree, be filed with a statement of such sum as it may be found upon an accounting therefor that the plaintiffs have received from said defendant corporation since the original decree was entered in the Court below. And that the said Superior Court be and it is hereby directed to cause an accounting to be had for the purpose of ascertaining how much money, if any, has been received from the said defendant corporation by the plaintiffs since the entry of said original decree, and that such accounting be limited to that object exclusively.

[NOTE.—Lines 17 and 18, referred to above, are in the last paragraph of the form of decree.]

On the same day that the foregoing orders were filed, February 11, 1881, the following additional order was filed in the same case:

By the COURT:

Ordered that the following paragraph in the opinion of this Court, heretofore filed herein, be stricken out:

"And the Court must order and decree that the said repre-

sentatives of Wilson and the said defendant Victor Beaudry make and execute to the purchaser or purchasers at said sale a good and sufficient transfer and assignment in law and equity of the entire capital stock of said corporation, known as the 'Lake Vineyard Land and Water Association.'"

IN BANK.

[Filed February 16, 1881.]

No. 7333.

FRANK W. GROSS, PETITIONER,

VS.

D. M. KENFIELD, RESPONDENT.

SALARY OF CLERK OF SUPREME COURT FIRST ELECTED UNDER NEW CONSTITUTION \$4,000 PER ANNUM, AND NOT SUBJECT TO LEGISLATIVE REDUCTION. The Clerk of the Supreme Court elected in 1879, at the first election after the adoption of the new Constitution, was elected while Section 755 of the Political Code, fixing the salary of that officer at \$4,000 per annum was still in force; and his term of office commenced before that section was changed by the passage of the amendatory Act of April 23, 1880, which fixed the salary at \$3,000 per annum: *Held*, therefore, as his compensation by express terms of the Constitution could not be increased or diminished during the term for which he was elected, that the Act of April 23, 1880, reducing the salary, did not apply during his term of office.

EFFECT OF NEW CONSTITUTION ON OLD LAWS NOT INCONSISTENT THEREWITH. The old law providing for the election of Clerk of the Supreme Court, prescribing his duties, and fixing his compensation, which was in force at the time of the adoption of the new Constitution, not being inconsistent therewith, was continued in force until changed, and is to be treated as if the new Constitution had been in force at the time of its passage.

Mandate.

Belcher & Belcher, for petitioner.

By the COURT:

The petitioner was elected Clerk of the Supreme Court under a clause of Section 10, Article XXII, of the Constitution, which provides that, "The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided by law." And the terms of office of all such officers are fixed by another clause of the same section. The Constitution, so far as it "relates to the election of officers," and "the commencement of their terms of office," went into effect July 4, 1879. (Sec. 12, Art. XXII.) The law then in force relating to the time and manner of electing officers was continued in force until after the election

of the first officers chosen under the new Constitution. And so was the law which fixed the commencement of their terms of office. Before and at the time of the adoption of the Constitution there was a law in force which provided for the election of a Clerk of the Supreme Court, prescribed his duties, and fixed his compensation, and that law not being inconsistent with the Constitution should be treated, we think, as it would be if the present Constitution had been in force at the date of its passage. (Sec. 1, Art. XXII.)

The same reason exists against increasing or diminishing the compensation of the present incumbent during his term of office as will exist against increasing or diminishing the compensation of his successor during his term of office. And it seems to us that the constitutional prohibition applies as well to the one elected at the first as it will to those elected at subsequent elections under the present Constitution. And if so, it follows that Section 755 of the Political Code as amended by the Act of April 23, 1880, is inoperative as to the compensation to be paid to the Clerk of the Supreme Court whose term of office had commenced before the date of said enactment; and that said Clerk is entitled to receive the compensation as fixed by the law in force at the date of the commencement of his term of office.

Let the peremptory writ of mandate issue as prayed for in the petition.

DEPARTMENT No. 2.

[Filed February 17, 1881.]

No. 6629.

J. S. DYER, APPELLANT,

VS.

M. BROGAN, RESPONDENT.

STREET ASSESSMENTS IN SAN FRANCISCO—AFFIDAVIT OF DEMAND SUFFICIENT EVIDENCE OF DEMAND. Under Section 11 of the San Francisco Street Law (Stats. 1871-2, 814), the affidavit of demand is sufficient evidence of such demand.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

J. M. Wood, for appellant.

E. R. Taylor, for respondent.

By the COURT:

Plaintiff brought his action to foreclose a lien for work

done on one of the streets of the city of San Francisco. On the trial the assessment, diagram and warrant described in the complaint were given in evidence, and the affidavit of demand was offered in evidence, was objected to by defendant, and was excluded by the Court.

The question presented by this appeal is, Was the affidavit evidence of the demand? We are of the opinion that it was, under Section 11, Laws of 1871-2, pages 814-15.

Judgment reversed and cause remanded for a new trial.

IN BANK.

[Filed February 16, 1881.]

No. 6847.

JENNIE BEESON, RESPONDENT.

VS.

THE GREEN MOUNTAIN GOLD MINING COMPANY,
APPELLANT.

ACTION BY WIDOW FOR CAUSING DEATH OF HUSBAND—RELATIONS BETWEEN THEM NOT IMPROPER SUBJECT OF CONSIDERATION. In an action by a widow for damages for causing the death of her husband, it is not improper for the jury to take into consideration the relations existing between them at the time of his death, and the injury, if any, sustained by her in the loss of his society.

CODE OF CIVIL PROCEDURE, SEC. 377—MEANING OF "ALL THE CIRCUMSTANCES OF THE CASE." In an action by a widow for damages for causing the death of her husband, the social and domestic relations between them and their demeanor towards each other are parts of "all the circumstances of the case," which are proper subjects of consideration in estimating damages, as provided in Section 377 of the Code of Civil Procedure.

Appeal from the District Court of the Twenty-first Judicial District, Plumas County.

J. D. Goodwin and *J. S. Chapman*, for appellant.

W. W. Kellogg and *R. H. F. Variel*, for respondent.

MYRICK, J., delivered the opinion of the Court:

This case was heard in Department Two of this Court, and the opinion of the department was filed August 26, 1880. Subsequently, upon petition by the appellant, a hearing of the case by the Court in bank was granted, which hearing has been had. The relations existing between Beeson, the deceased, and the defendant and its superintendent, and the responsibility of the defendant for the acts and omissions of its superintendent were considered at length in the opinion of the Department; and being of opinion that the law concerning the same is therein correctly stated, we have nothing

further to add upon that branch of the case except to add *Hough vs. Railway Company*, 100 U. S. 213, to the cases cited.

Another branch, not discussed by the Department, we will here consider; that is, as to the correctness of the following instruction given to the jury by the Court below, viz.:

"6. The Court instructs you, that if your verdict shall be for the plaintiff, such damages may be given by you to plaintiff as under all the circumstances of the case may be just. And in determining the amount of such damages you have the right to take into consideration the pecuniary loss, if any, suffered by this plaintiff in the death of said George Beeson, by being deprived of his support; also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society."

The appellant contends that the latter part of this instruction, commencing with the words, "also the relations," etc., is erroneous for the reason that all damages to be recovered in actions of this character are to be measured by the pecuniary loss sustained by the plaintiff, and that the relations existing between the plaintiff and deceased, and the loss by her of the society of the deceased cannot be a basis for estimating or affording pecuniary compensation.

The statute of this State (Section 377, C. C. P.) provides that in this class of actions "such damages may be given as under all the circumstances of the case may be just." Under this clause evidence was offered and received as follows:

Question to plaintiff as a witness on her own behalf: "In regard to the character of your social relations, explain to the jury as nearly as you can what they were." The objection of the defendant was overruled. The answer was: "Our social relations were always pleasant. He never spoke an unkind word or done anything in any way to make me feel badly. He was always kind to me." The instruction above quoted had reference to this testimony.

It is true, that in one sense, the value of social relations and of society cannot be measured by any pecuniary standard; and possibly the Legislature, in enacting Section 377, C. C. P., may not have intended to give relief in that sense, especially as the words "pecuniary or exemplary," which were formerly in the section, were omitted in the amendment of 1873-74; but in another sense it might be not only possible, but eminently fitting, that a loss from severing social relations or from deprivation of society might be measured,

or at least considered, from a pecuniary standpoint. If the instruction be good from any point of view presented by the case, it should be sustained, unless the party alleging the error asked the Court to give such direction to the instruction as that it could not be aimed at the point of view in reference to which it may be good.

If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So, if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration; not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy. In *Penn. R. R. Co. vs. Goodman*, 62 Penn. St. R. 339, the Court said, referring to the use of the word "companionship," that "companionship was evidently used to express the relation of the deceased in the character of the service she performed. The Judge merely meant to say that the loss should be measured by the value of her services as a wife or companion. The form of expression, perhaps, was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be measured by the nature of the service characterized as it was by the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife and the mother of children, surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value."

We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of "all the circumstances of the case" for the jury to take into consideration in estimating what damages would be just from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace.

It is not necessary for us to consider the question, discussed by counsel, as to the doubt or ambiguity arising from the use of the words "heirs or personal representatives"

in the section above referred to, or to determine, in advance, how any moneys recovered in an action brought by more than one heir should be divided. It is sufficient for this case to state that the plaintiff, in her complaint, alleged that she was the wife and is the widow and the heir of said deceased, and that there are no living issue of the marriage, and that the defendant did not, either by demurrer or answer, present the point of non-joinder. We may remark that the statutes of many of the States make provision for the adjustment and distribution among the heirs of the moneys recovered; but the statute of this State is silent upon the subject. When the matter shall be presented, it may be that much embarrassment will be felt in determining how much should go to a widow, how much to a minor and how much to an adult child, if persons occupying those relations to the deceased should be plaintiffs or should be entitled to recover. Until such a case shall arise, we have no occasion to consider the question.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J., McKee, J.

I dissent: McKinstry, J.

I dissent, and will hereafter state the grounds of my dissent: Ross, J.

I dissent: Morrison, C. J.

DEPARTMENT No. 2.

[Filed January 18, 1880.] .

No. 10,566.

THE PEOPLE, RESPONDENT,

vs.

LEONARD P. SMITH, APPELLANT.

CRIMINAL LAW—HOMICIDE—QUESTION AS TO PRESUMPTION OF INSANITY. On a murder trial, where the Court gave a part of an instruction asked by defendant to the effect that if at the time of the commission of the act charged, his mind was so disordered or diseased that he was incapable of distinguishing good from evil, right from wrong, he was irresponsible and should be acquitted, but refused to charge that "further, if the person was in this condition a short time before the commission of the act, the presumption is that he was insane when he committed it:" *Held*, that the refusal was correct.

APPEALS WHERE TESTIMONY NOT CARRIED UP—PRESUMPTION IN FAVOR OF THE INSTRUCTIONS. If on an appeal in a criminal case no part of the testimony is carried up, the Appellate Court will not reverse the judgment on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts.

Appeal from the Superior Court of Del Norte County.

L. F. Cooper, for appellant.

A. L. Hart, Attorney-General, for respondent.

THORNTON, J., delivered the opinion of the Court:

The defendant was by information accused of murder, and on the trial the jury found him guilty of murder in the second degree. The defendant moved for a new trial, which was denied, and the Court pronounced sentence that the defendant be punished by confinement in the State Prison for the term of ten years. The defendant appealed from the order denying a new trial, and from the judgment.

The only error assigned in this Court arises in the refusal of the Court to instruct the jury.

The counsel for defendant asked that the jury be directed as follows:

"If you find from the evidence that at the time the prisoner committed the act charged, his mind was so far disordered or diseased that he was incapable of distinguishing good from evil, right from wrong, he was irresponsible and should be acquitted.

"Further, if the person was in this condition a short time before the commission of the act, the presumption is that he was insane when he committed it."

The Court gave the instruction as requested, except the portion italicized. To the refusal to give this portion an exception was reserved by the defendant.

There is no part of the testimony in the transcript, and when such is the case it is well settled that this Court will not reverse the judgment on account of instructions alleged to be erroneous, "unless it appears that such instructions would have been erroneous under every conceivable state of facts." (*People vs. Dick*, 34 Cal. 655; *People vs. Levison*, 16 Id. 98; *People vs. King*, 27 Id. 514; *People vs. Dick*, 32 Id. 213.) For aught that we can see, the portion of the instruction refused may have been entirely abstract—that is, without any evidence on which to base it. Such a direction may have led the minds of the jury away from the true issue before them for trial. (See also *People vs. Donahue*, 45 Cal. 321; *People vs. Strong*, 46 Id. 304.)

Further, it would have been error in the Court to have given the portion of the instruction refused. (*People vs. Francis*, 38 Cal. 188-9.)

Judgment and order affirmed.

We concur: Myrick, J. Sharpstein, J.

DEPARTMENT No. 2.

[Filed February 17, 1881.]

No. 7044.

W. H. BEATTY, RESPONDENT,
vs.

W. H. DIXON ET AL., APPELLANTS.

EQUITABLE ACTION TO SETTLE AND DETERMINE CONFUSED AND UNCERTAIN BOUNDARIES OF LAND. Where a plaintiff brought an action in equity against a large number of defendants to settle and determine confused and uncertain boundaries, and alleged that they were all owners in severalty of a certain tract of land, the boundaries of which through lapse of time, carelessness of occupants and absence of natural monuments had become confused and uncertain; that no one was occupying according to the original boundaries of his claim, thereby causing those contiguous to plaintiff to encroach upon his land; that all parties were equally interested; and praying that, to avoid multiplicity of suits, the proper relief might be granted in such action; and defendants admitted all such allegations except that of encroachment on others, and prayed that the true lines of their several tracts might be fixed and established: *Held*, that equity had jurisdiction, and that the action might be maintained and the necessary relief granted.

ACTION TO DETERMINE CONFUSED BOUNDARIES—APPOINTMENT OF JUDGE'S SON AS COMMISSIONER TO RUN LINES DOES NOT DISQUALIFY JUDGE. Where, in an equity action to settle and determine confused and uncertain boundaries, the Judge in the interlocutory decree, directing the true lines to be ascertained, appointed his son a commissioner to run the lines: *Held*, that such appointment did not disqualify the Judge from further action in the case.

AMENDMENT OF INTERLOCUTORY DECREE AFTER SIX MONTHS—POWER OF COURT. Where an interlocutory decree in an equity case was amended more than six months after its entry, so as to make it conform to the findings and judgment of the Court: *Held*, these being matter of record by which to make the amendment, that the power of the Court to make it was unquestionable.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

*P. Dunlap, J. H. McKune and W. F. George, for appellants.
Beatty & Denson and R. C. Clark, for respondent.*

SHARPSTEIN, J., delivered the opinion of the Court:

This action was commenced against nineteen defendants. It is alleged, among other things, in the complaint, that the plaintiff and the defendants are the owners in severalty of a certain tract of land, the boundaries of which, through the lapse of time, the carelessness of occupants and the absence of natural monuments, have become confused and uncertain. The external lines of the entire tract, and those describing the several subdivisions of it have been obliterated, so that

no one of the defendants is occupying according to the original boundaries of his claim, which causes those occupying tracts contiguous to plaintiff's to encroach upon his land. All of the parties are equally interested in having said boundaries determined in one action in order to avoid multiplicity of suits at law which would necessarily have to be resorted to, if the relief prayed for in this action be denied.

The appellants in their answers do not deny any of these allegations, except that which charges them with encroaching upon the lands of others, and they pray that the true lines of their several tracts may be fixed and established.

One of the grounds upon which it is insisted that the judgment in this case should be reversed, is that the facts alleged do not constitute a sufficient ground for the interference of a Court of equity. This raises the question whether the case is one within the exclusive jurisdiction of a Court of law, or of which a Court of equity has concurrent jurisdiction. The circumstance that the plaintiff might obtain all the relief to which he is entitled in a Court of law would not necessarily oust a Court of equity of jurisdiction of the case. There might, nevertheless, be some equitable ground upon which that jurisdiction could be upheld—"such as fraud, or some relation between the parties, which makes it the duty of one of them to protect and preserve the boundaries; or the prevention of a multiplicity of suits; or that the question affects a large number of persons, and the boundaries have become confused by the lapse of time, accident or mistake." (*Wetherbee vs. Dunn*, 36 Cal. 255). One writer on Equity Jurisprudence says: "The relief which equity affords in the case of confusion of boundaries, is referable to the head of accident. When lands have become mixed or confounded without the fault of the plaintiff, equity will appoint a commission to settle the boundaries." (*Williard's Eq. Jur.* 56.) The prevailing doctrine upon this subject is well expressed, we think, by Mr. Tyler, who says: "From the cases examined it is very clear that, both in England and in this country, Courts of equity will always take cognizance of controversies in respect to boundaries of land whenever the parties cannot obtain substantial relief in a Court of law, or where equitable circumstances are shown, calling for the interference of a Court of equity; although, as a rule, unless some statute exists upon the subject, the existence of a controverted boundary is not of itself alone a ground for relief in equity. Other circumstances must be shown which seem to require the interference of the Court." (*Tyler's Law of Boundaries*, 266.)

Is it shown that any of these circumstances exist in this case? Is it shown that the question involved in this action affects a large number of persons, and that by proceeding in equity to determine the controversy a multiplicity of actions at law will be prevented? If so, the additional circumstance that "the boundaries have become confused by lapse of time, accident or mistake," is all that is required to give a Court of equity jurisdiction of the case. (*Wetherbee vs. Dunn, supra.*) The existence of these circumstances is alleged in the complaint and not denied in any of the answers.

Before making its interlocutory decree the Court found upon all the issues which it could find upon before the Commissioner who was appointed to survey and fix the boundaries in controversy had reported. The appellants insist that additional findings should have been filed after the report was made, and before entering the final decree. We do not think so. The only question which the Court had to determine after the report was made was whether it should be confirmed. If confirmed it constituted the basis of the final decree. There was no occasion for any findings in addition to those upon which the interlocutory decree was based.

As to the alleged insufficiency of the evidence to justify the decision of the Court, an examination of that which has been brought up in the bill of exceptions satisfies us that the evidence, although conflicting upon some points, is sufficient to justify the decision.

The rulings of the Court upon the trial, which were excepted to, were not, as we view them, erroneous.

We know of no authority upon which it could be held that the appointment by the Judge of his son, as a commissioner to run the boundary lines, disqualified the Judge to further act in the case, although the fixing of his son's compensation for such services would devolve upon the Court of which he was the Judge.

The amendment of the interlocutory decree, so as to make it conform to the findings and judgment of the Court, was proper, although made more than six months after the decree was entered. There being matter of record, by which the amendment could be made, the power of the Court to make it is too well settled to admit of doubt.

After a careful consideration of the points presented by the appellants, we are satisfied that the order and judgment of the Court below ought not to be disturbed.

Judgment and order appealed from affirmed.

We concur: Myrick, J., Thornton, J.

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No. 3.

Supreme Court of California.

IN BANK.

[Filed February 18, 1881.]

No. 7614.

THE PEOPLE, ETC., EX REL. JAMES C. PENNIE,
RESPONDENT.

VS.

L. W. RANSOM, APPELLANT.

JUSTICES OF THE PEACE JUDICIAL OFFICERS, AND TO BE ELECTED AT THE SAME TIME AS STATE OFFICERS. Justices of the Peace are judicial officers within the meaning of Section 10 of Article XXII of the new Constitution, which provides that such officers are to be elected at the time and in the manner that State officers are elected.

JUSTICES OF THE PEACE TO BE ELECTED ON EVEN-NUMBERED YEARS—TERMS OF THOSE ELECTED IN 1879 SHORTENED ONE YEAR. Justices of the Peace are of the officers who, under the new Constitution, are to be elected on the even-numbered years, and those elected in 1879 were of the officers, provided for by the Constitution, whose terms of office were shortened one year by Section 20 of Article XX.

AMENDMENT OF 1880, OF PART I OF CODE OF CIVIL PROCEDURE, CONSTITUTIONAL. The Act of April 1, 1880, amending Part I of the Code of Civil Procedure (Amendments of 1880, 21) is constitutional; and, as regards the duties of Justices of the Peace, it is neither a local nor special, but a general law.

Appeal from the Superior Court of the City and County of San Francisco.

Rhodes & Barstow and *L. Reynolds*, for appellant.

A. L. Hart, Attorney-General, and *D. T. Sullivan*, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to determine the right of the relator, Pennie, to the office of Justice of the Peace for the City and County of San Francisco against the defendant Ransom.

The Court below found that the defendant was on the third day of September, 1879, duly elected a Justice of the Peace

for said City and County, and afterward qualified and entered upon the discharge of the duties of said office, and held said office under the election just referred to; that the relator did on the second day of November, 1880, at a general election held on said last named day, receive the largest number of votes, and was on said day elected a Justice of the Peace for said City and County; that he was duly commissioned and qualified as such Justice, and afterwards made a proper demand on the defendant that he surrender to him the said office, which the defendant refused to do.

As conclusions of law, it was held that the defendant usurped the said office; that plaintiff was entitled to it, and the Court rendered judgment in favor of relator.

From this judgment defendant prosecuted this appeal, which brings before us the validity of the election of the relator at the general election of 1880.

The tenth Section of Article XXII of the Constitution is in these words:

"In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same, shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the term as in this section provided. The first officers chosen, after the adoption of this Constitution, shall be elected at the time and in the manner now provided by law. Judicial officers and Superintendent of Public Instruction shall be elected at the time and in the manner that State officers are elected."

And the twentieth Section of Article XX is as follows:

"Elections of the officers provided for by this Constitution, except at the election in the year 1879, shall be held on the even-numbered years next before the expiration of their respective terms. The terms of such officers shall commence on the first Monday after the first day of January next following their election."

That the Justices of the Peace were to be elected at the general election in 1879, we have no doubt. They were of the class of judicial officers referred to in the section first quoted. We so held in *McGrew vs. Mayor of San Jose* (opinion filed September 7, 1880), and we are satisfied that that determination was correct. Granting that the reason for the insertion of the last clause in the above-mentioned Section 10, was as contended for by the learned counsel for appellant, the language is broad enough to include Justices of the Peace,

and we see no reason to hold that they were not intended to be included by the framers of the Constitution. Justices of the Peace constitute a part, and a most important part, of the Judicial Department of the State Government, by the express language of the Constitution. (Article VI, Section 1.) That they are as much judicial officers as any Justice of this Court, or any Judge of the Superior Court, we see no reason to doubt.

We are also of opinion that they are of the officers whose election, except at the election of 1879, was to be held on the even-numbered years (Art. XX, Section 20), and that the terms of their office are shortened one year by the provisions of Section 10 of Article XXII. They are of the officers provided for in the Constitution, although the powers, duties and responsibilities are to be fixed by the Legislature, and the number to be elected in various political divisions is to be determined by the same authority. (See Art. VI, Sections 1 and 11.)

It may well be contended that the Constitution has fixed the day of the general election for 1880, on the first Tuesday after the first Monday in November, 1880 (see Art. IV, Section 3, which is the day fixed by that instrument for the election of members of the Assembly.) The Legislature has, however, fixed the day last named for the general election by a valid and constitutional law passed on the sixteenth day of April, 1880 (see amendments to the Codes, 77, amending Section 1041 of the Political Code), and has provided by law for the election of all Justices of the Peace at the general election of 1880. (See Section 1 of Act of 1880, amending portions of the Code Civil Procedure—Amendments to Codes, 21.) The sections of the Code of Civil Procedure, as amended, particularly referred to here are 85, 103 and 110.

The Act is assailed as unconstitutional. We have examined it and see no ground to hold it to be so. We find nothing in it in conflict with the Constitution. As regards the duties of Justices of the Peace, it is neither local nor special, but is a general law in that respect. But if there is any portion of the Act of that character we cannot see that it affects the question before us.

The views herein expressed are in harmony with what was said by the Justices of this Court in *Barton vs. Kalloch*, whether concurring or dissenting.

The judgment of the Court below is affirmed.

We concur: Morrison, C. J., Myrick, J., Sharpstein, J., McKee, J.

I concur in the judgment: Ross, J.

IN BANK.

[Filed February 17, 1881.]

No. 7419.

THOMAS F. LANGENOUR, PETITIONER,
VS.
JAMES F. SHANKLIN, RESPONDENT.

CONTEST AS TO PUBLIC LAND—SURVEYOR-GENERAL BOUND BY DECISION OF CASE PROPERLY REFERRED TO COURT. Where a settler on public land located upon it certain school land warrants, claiming the land to be a part of the 500,000 acres donated to the State and subject to such location, and another person claimed the same land under a State patent for swamp land, and the Surveyor-General referred the contest between them to the proper Court, wherein there was a final judgment in favor of the settler, and it further appeared that the land was a part of the 500,000 acre grant: *Held*, that the Surveyor-General could not resist recognizing him as the party entitled to the land.

EVIDENCE AND RULINGS OF COURT IN CASE OF CONTEST AS TO PUBLIC LAND NOT OPEN TO ATTACK BY SURVEYOR-GENERAL. Where a contest in relation to public land, arising before the Surveyor-General, was properly referred by him to the proper Court, and there was a final judgment in favor of one of the parties: *Held*, on application to compel the Surveyor-General to approve the successful party's application to purchase, that said officer could not call in question the evidence on which the Court rendered its judgment or its rulings on matters of law.

NEW CONSTITUTION, ART. XVII, SEC. 3, DOES NOT AFFECT RIGHTS WHICH ATTACHED PRIOR TO ADOPTION. Section 3 of Article XVII of the new Constitution, in relation to the granting of public lands suitable for cultivation only to actual settlers, has no application to cases of land where rights thereto attached prior to the adoption of such Constitution.

WHERE CONTEST AS TO PUBLIC LAND DETERMINED, NEW PARTIES NOT ALLOWED TO COME IN BY INTERVENTION. Where there had been a contest between two persons as to the right to purchase certain public land, and such contest, after being referred to the proper Court, was finally determined therein, and an application was then made to compel the Surveyor-General to approve the application of the successful party: *Held*, that new parties could not be allowed to come into such proceeding by intervention and prevent the enforcement of the judgment.

EFFECT OF JUDICIAL DETERMINATION OF CONTEST AS TO PUBLIC LAND—DUTY OF SURVEYOR-GENERAL—MANDAMUS. Where, in a case of contest as to the right to purchase certain public land, there had been a reference and final judicial determination of the questions involved in favor of one party and against the other: *Held*, that it became the duty of the Surveyor-General, in accordance with Section 3416 of the Political Code and on application therefor, to approve the application of the successful party and that he might be compelled to do so by mandamus.

Mandate.

W. B. Treadwell and *W. C. Belcher*, for petitioner.

Ross, J., delivered the opinion of the Court:

This is an application for a writ of mandate to compel the

Surveyor-General to approve the petitioner's application for the purchase of certain lands. The petition avers that on the 15th of June, 1852, under and by authority of the provisions of the Act of the Legislature entitled "An Act to provide for the disposal of the five hundred thousand acres of land granted to this State by Act of Congress, that the people of the State of California may avail themselves of the benefits of the eighth Section of the Act of Congress approved April 4, 1841, Chapter 16, entitled 'An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights,' the following provisions are hereby enacted," approved May 3, 1852, the Governor of the State duly signed and issued, among others, two certain land warrants for one hundred and sixty acres each, numbered respectively 434 and 550, and which were countersigned by the Controller of the State and by him deposited in the office of the Treasurer of the State, for sale; that afterwards, to wit, on the 1st of July, 1852, the said Treasurer, under and by authority of the provisions of said Act, upon an application to him therefor, sold the said warrants to the petitioner, and petitioner became the purchaser thereof, and paid therefor into the treasury of the State the sum of six hundred and fifty dollars in lawful currency of the United States; that on the 13th of July, 1864, the tract of land in question, containing 320 acres, and situated in Yolo County and within the district of lands subject to sale at the United States Land Office at Marysville, was unappropriated land belonging to the United States, subject to location by said warrants, and was in the actual occupation of petitioner and was unoccupied by any other person; that at the date last mentioned petitioner had improvements on said land, and there were not any improvements of any description thereon except those of the petitioner, nor was there then any valid claim to said land adverse to the claim of the petitioner; that at said last mentioned date the said land was, and for more than three months prior thereto had been surveyed by authority of the United States, and a plat of the township containing the same had been duly approved by the United States Surveyor-General for California and filed in said Marysville Land Office; that on the said 13th day of July, 1864, petitioner presented to and filed with the Locating Agent of said State for said Marysville Land District his request and application to purchase said land from the State of California by the location of said land warrants thereon, which application was accompanied by the affidavit of petitioner, and the affidavits of three disinterested persons, that there was no valid claim existing upon said

land adverse to the claim of petitioner, and that there were no improvements thereon except those owned by petitioner; that at the time of filing said application and affidavits petitioner surrendered to said Locating Agent, in payment for said land, the said land warrants; that on the 14th of July, 1864, the said Locating Agent indorsed on said application his acceptance thereof, and thereafter, on the same day, made and filed with the Register of said United States Land Office at Marysville, an application to the United States on behalf of the State of California, for the said land, as a part of the grant of 500,000 acres of land made to said State by the Act of Congress entitled "An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4, 1841, and in accordance with the eighth section of said Act, and specified in his said application that said land was to be taken by the location of said warrants 434 and 550; that on the 24th of October, 1867, the said Locating Agent indorsed on the said application so made by this petitioner, a certificate that he, said Locating Agent, had located the said land as a portion of the lands of the said State, at the request and for the use of this petitioner, and thereafter, on the same day, filed said application, with the accompanying affidavits and certificates, in the office of the Surveyor-General of said State, and then and there delivered to said Surveyor-General the said warrants; that on the 3d day of February, 1876, the said land was listed, approved and certified by the United States to the State of California, as a part of said grant of 500,000 acres of land, which listing and certification was made under and in pursuance of the said application so made to the United States by said Locating Agent, and not otherwise, and the title to said land thereupon vested in said State, and has since remained so vested; that afterwards, to wit, on the 8th of February, 1877, and while said land so remained in the actual occupation of petitioner, and while the same remained so improved by him, one Tiery Wright filed in the office of the Surveyor-General of said State his application to purchase said land from said State, and that on the 17th of September, 1877, said Wright filed with the said State Surveyor-General a written demand that the contest arising by reason of said applications of said Wright and of petitioner be referred to the proper tribunal for trial—whereupon, on the 18th of September, 1877, said Surveyor-General duly made and entered an order referring said contest to the Sixth Judicial District Court in and for Yolo County; that on the 21st of September, 1877, a duly certified copy of said order of reference was filed in the

office of the Clerk of said District Court, and thereafter, on the 22d of September, 1877, said Wright commenced an action in said Court against petitioner to determine said contest, which action was duly transferred to the District Court in and for the County of Sacramento; that such proceedings were had in said cause, that on the 26th of July, 1878, the said District Court in and for Sacramento County made and entered its decision and judgment therein, whereby it found and decided that the facts hereinbefore set forth were true, and that the said land had been sold by the said State to petitioner, and adjudged that petitioner's application for said land was good and valid, and that the said application of the said Wright was invalid, and that he had no right to purchase the said land; that subsequently, to wit, on the 20th of July, 1880, the said judgment of the District Court was, on appeal, in all things affirmed by the Supreme Court of said State, and a remittitur directed to be issued to the Superior Court thereof in and for said County of Sacramento; that on the 4th of September, 1880, the remittitur was duly filed with the Clerk of said Superior Court, and on the same day petitioner filed in the office of the said Surveyor-General duly certified copies of the judgment of said District Court and of the remittitur of said Supreme Court, and thereupon requested and demanded that said Surveyor-General approve the application of petitioner for the purchase of said land, which request and demand he refused to comply with, and still so refuses.

In answer to the petition the Surveyor-General denies that on the 13th of July, 1864, the land in question was subject to location with the land warrants mentioned in the petition, or in any other manner, and denies that at any time after the 21st day of August, 1862, the said land was unappropriated land belonging to the United States, but avers that at the date last mentioned a portion of the said land was "claimed to be the property of the State of California, and at said date the State of California, by the executive thereof, and in pursuance of law, did issue and grant a patent for said land to one Tiery Wright, whereby the title to said last described tract of land, so far as the State of California then had or should thereafter acquire title thereto, was vested in the said Wright. This patent is annexed to and made a part of respondent's answer, and shows affirmatively that it was issued for swamp land.

The respondent also in his answer denies that on the 13th of July, 1864, there was no valid claim existing upon the land described in the petition adverse to the claim of the

petitioner, but alleges that the title to a portion thereof had been passed by the State to Tiery Wright by virtue of the patent already mentioned.

Further answering, respondent denies that the copy of the final judgment filed in his office by petitioner, "shows that the District Court, * * or that any other Court, decided or found in any cause whatever that the land in the petition herein described had been sold by the State to the petitioner herein," and denies that the petitioner ever made any legal application for the land in question, or that petitioner's application to the State Locating Agent was authorized by law, or that the latter had authority to make the location.

The only other defense to the application for the writ made by the respondent is, that by affidavits on file in his office the land in controversy is shown to be suitable for cultivation, and that petitioner has not shown that he is an actual settler thereon, which, respondent claims, he must do by reason of Section 3 of Article XVII, of the present Constitution, before respondent is authorized to approve the application of petitioner.

Neither the denials nor the affirmative averments of respondent's answer, nor both combined, show sufficient cause for withholding the writ asked for.

1. There is nothing in the objection that the Surveyor-General had not the power to make the order of September 18, 1877, referring the contest between petitioner and Wright to the proper Court for determination. The ground of the objection is that the State had already issued a patent to Wright for a portion of the land. But that patent was for swamp land, and it is undisputed that all the land in question here formed part of the 500,000-acre grant. The patent therefore conveyed nothing. (*People vs. Stratton*, 25 Cal. 242, and other cases in this Court.

If, as is now urged by the Surveyor-General, that patent conveyed to Wright the title the State acquired to the land described in it, it is difficult to understand why the latter filed the application of September 17, 1877, for the purchase of a portion of the same land, and thus brought about the contest which was determined adversely to him by the Courts. It is evident, however, that Wright knew, when he did so, that by the patent he got nothing.

2. The respondent cannot be permitted in this proceeding to call in question the evidence on which the judgment in *Wright vs. Langenour* was based, or the rulings of the Court in that action on matters of law.

The Legislature, in Section 3414 of the Political Code, has

made provision for the reference by the Surveyor-General of such a contest as arose in his office between the petitioner and Wright to the appropriate Court for determination; and further provided as follows: "Section 3415—After such order is made, either party may bring an action in the District Court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry made by either the Surveyor-General or the Register, gives the Court full and complete jurisdiction to hear and determine the action."

"Section 3416—Upon filing with the Surveyor-General or Register, as the case may be, a copy of the final judgment of the Court, that officer must approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with such judgment."

When, under these provisions of the Political Code, a contest has been transferred to the Court for determination, the Court requires "full and complete jurisdiction to hear and determine" the contest, and as a necessary result the Surveyor-General has no longer the power to determine any question of law or fact involved in the matter—the very purpose of the law being, in such cases, to take from the Surveyor-General that power and to vest it in the Court. The sole duty of the Surveyor-General thereafter is that prescribed by Section 3416—"to approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with" the judgment of the Court. It is not necessary, nor does the statute contemplate that the Surveyor-General should be a party to the action instituted to determine the contest. The law specially enjoins on his part action in accordance with such judgment, and his refusal to act in accordance therewith may be compelled by mandamus. (Sec. 3416, Political Code, and Sec. 1085 of Code of Civil Procedure.)

That the title to the land in question here is in the State is not denied by the answer of the respondent, and that it was acquired by the location of the petitioner's land warrants for which the State received the petitioner's money is also not denied. The title thus acquired by the State was for the benefit of the petitioner. (*Bludworth vs. Lake*, 33 Cal. 262), and the State is estopped from denying it.

3. Section 3 of Article XVII of the present Constitution has no application to the present case, for the reason that the rights of the petitioner attached to the land long prior to its adoption. (*Cases supra.*)

4. The application of Hennagin to intervene in the pro-

ceeding must be denied. His petition is based on an alleged application made by him on the 17th day of September, 1880, to purchase the land from the State. There would be no end to cases of this character if, after judgment has been entered in an action to determine the right of contestants to purchase, new parties can come in to prevent the enforcement of such judgment. Section 387 of the Code of Civil Procedure does not authorize an intervention under such circumstances.

5. It having been determined by the Court in the action of *Wright vs. Langenour*, that the application of the petitioner for the purchase of the land in dispute was good and valid, and that the application of Wright therefor was invalid, it becomes the duty of the respondent, by virtue of Section 3416 of the Political Code, to approve petitioner's application.

Let the writ issue as prayed for.

We concur: Thornton, J., Sharpstein, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed October 25, 1880.]

No. 6843.

GRANT vs. WHITE.

The rule regarding the execution of instruments by married women is correctly stated in *Jones on Mortgages*, Section 538.

[The rule is, that the notary's certificate is conclusive, unless it be alleged and proved that there was fraud, duress, or imposition connected with the acknowledgment, and that the grantee or mortgagee had notice of such fraud, duress, or imposition.]

We are of opinion that no ground appears for setting aside the default of the defendant, Sarah L. White. It does not appear but that Mr. Venable was authorized to represent her. We do not see that fraud or imposition was practiced upon her at the time of the execution of the mortgage, and we are of opinion that there was nothing improper in the professional conduct of Mr. Venable. We think the rule regarding the execution of instruments by married women is correctly stated by Mr. Jones in his work on *Mortgages*, Section 538.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed February 18, 1881.]

No. 6655.

S. O. HOUGHTON, APPELLANT,

VS.

JOHN STEELE AND J. G. EASTLAND, EXECUTORS, ETC.,
OF P. C. LANDER, DECEASED, RESPONDENTS.

CONDITIONS SUBSEQUENT—NO ADVANTAGE OF NON-PERFORMANCE TO BE TAKEN BY PARTY PREVENTING PERFORMANCE. The performance of a condition subsequent may be excused by the obstruction or prevention of the other party, and in such case the latter cannot take advantage of the want of performance.

Appeal from the District Court of the Nineteenth Judicial District, City and County of San Francisco.

Houghton & Reynolds, for appellant.

O. P. Evans, for respondents.

THORNTON, J., delivered the opinion of the Court:

For the purposes of this case, it may be admitted that the deed of Donner to Yontz contained a condition subsequent, upon a breach of which Donner might by entry have avoided the deed, and been restored to his original seizin. Still the performance of this condition by Yontz might have been excused by the obstruction or prevention of the performance by the grantor Donner. (*Marshall vs. Craig*, 1 Bibb. 389; *Majors vs. Hickman*, 2 Id. 217; 1 Roll. Ab. 453; 1 Lomax's Dig. 274.) On this point the Court found as follows: "That John Yontz has duly performed all the conditions on his part to be performed, which are mentioned in said deed of April 10, 1858, except so far as he has been prevented from performing said conditions by said George Donner and the plaintiff in this action; and as to the performance of such part of the conditions in said deed to be performed by said Yontz, and which he has been prevented from performing by plaintiff and his grantor Donner, said Yontz and his successors in interest are excused." This finding is inserted in the conclusions of law, but it nevertheless finds facts.

It is urged by appellant that this finding is not sustained by the evidence. We have examined the evidence, and are of opinion that the finding cannot be disturbed on that ground. There is some conflict in the evidence, but there is sufficient to justify the finding in question.

Yontz having been excused by Donner from the performance of the condition, neither he nor plaintiff can take advantage of the want of performance. This is conclusive of the case, and the judgment and order are therefore affirmed.

We concur: Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed February 16, 1881.]

No. 7216.

FARTON SMITH, RESPONDENT,

VS.

D. H. ARNOLD, APPELLANT.

INSTRUCTION TAKING FROM JURY CONSIDERATION OF ISSUE MATERIAL TO LOSING PARTY, ERROR. In an action by A, claiming to be owner by virtue of a bill of sale from B of certain personal property, against a Sheriff for seizing the same as the property of others, where, after evidence *pro* and *con* had been heard as to B's ownership, the Court, against defendant's objection, charged the jury "that unless defendant shows by a preponderance of evidence that plaintiff was not a purchaser in good faith and for a valuable consideration of the property in controversy, they must find for plaintiff," and there was a verdict for plaintiff: *Held*, that the instruction in effect took from the jury the consideration of the issue as to whether the property had belonged to B, and was therefore erroneous.

Appeal from the Superior Court of Colusa County.

J. C. Denal, for appellant.

Hart & Hart, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was instituted to recover of the defendant certain personal property, which it is alleged by plaintiff he was the owner of, and that defendant unlawfully detains it from him. The defendant by his answer denied plaintiff's alleged ownership, and justified the said taking and detention by him as Sheriff of the County of Colusa, under certain writs of attachment which came to his hands to be executed in two certain actions issued out of the District Court for the county aforesaid, in one of which said actions one George W. Ware was plaintiff, and Ah Sam, See Sing, Ma Ah Ming and Rhen Kong were defendants, and in the

other of said actions Rhen Kong was plaintiff, and Ah Sam, See Sing and Ma Ah Ming were defendants; that under these said writs he seized and took into possession and holds the property sued for, which is the property of the above named Ah Sam, See Sing and Ma Ah Ming. The cause was tried by a jury, who returned a verdict for the plaintiff that defendant return the property or pay the value thereof, assessed at \$100. Defendant moved for a new trial, which was denied, and he appealed to this Court from the order denying a new trial and from the judgment.

It is urged here that the evidence is insufficient to sustain the verdict. We have examined the evidence, and are of opinion that there is some evidence to sustain the verdict on every point on which the case was contested, and that it (the verdict) should not be disturbed on any such ground.

The plaintiff claimed to make out title to the property by virtue of a bill of sale from one Lin Song to him. The ownership of Lin Song was put in issue by the pleadings, and evidence on that issue *pro* and *con* had been offered on the trial and was before the jury for consideration. In this condition of things, the Court instructed the jury "that unless the defendant shows by a preponderance of evidence that the plaintiff was not a purchaser in good faith and for a valuable consideration of the property in controversy, they must find for the plaintiff."

By this direction the Court in effect took from the jury the consideration of the issue as to whether the property sued for was the property of Lin Song, the vendor of the plaintiff. If the jury came to the conclusion that Lin Song never owned the property sued for, it was not necessary for them to determine any other issue. If this issue was found against plaintiff, that was an end of his case. This instruction was a misdirection. On account of this error a new trial should have been granted.

It was contended by plaintiff that this instruction was not excepted to by the defendant. But on an examination of the record we find that it was. The statement of the exception was inserted near the end of the statement—an unusual place; still the record of the case shows that the point was reserved by exception.

It follows from the foregoing that the judgment and order denying a new trial must be reversed, and the cause remanded to the Superior Court of the County of Colusa to be tried anew. So ordered.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 2.

[Filed February 15, 1881.]

No. 6368.

MARIA B. JUDAH, EXECUTRIX, ETC., RESPONDENT,
VS.

JOHN FREDERICKS, APPELLANT.

ACTION BY EXECUTORS—FAILURE TO ALLEGE REPRESENTATIVE CAPACITY AS ISSUABLE MATTER OF FACT FATAL ON GENERAL DEMURRER. Where, in an action by an executrix as such, the only averment in the complaint of her representative capacity was, "that she is the duly appointed, qualified and acting executrix of the last will and testament of John Ferguson, deceased," and a general demurrer thereto was overruled, and judgment rendered for plaintiff: *Held*, on appeal, that there was no sufficient averment of the fact that she was the personal representative of the estate of John Ferguson, deceased; that the complaint therefore did not show a right of action; that the demurrer should have been sustained, and that the judgment was erroneous.

PLEADING OF REPRESENTATIVE CAPACITY BY EXECUTOR OR ADMINISTRATOR MUST BE IN DIRECT AND ISSUABLE FORM. In an action by an executor or administrator, it is necessary for the plaintiff to allege in a direct and issuable form that he is such executor or administrator; and it is not sufficient to make the allegation merely as *descriptio personæ*.

Appeal from the County Court of the City and County of San Francisco.

P. B. Ladd, for appellant.

G. F. & W. H. Sharp, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This action is brought to recover a certain tract of land situate in the City and County of San Francisco, the allegation in the complaint being that the property in controversy was leased by one John Ferguson to the defendant. The complaint avers: That "Maria B. Judah, of the City and County of San Francisco, plaintiff in the above entitled action, complains of John Fredericks, of said city and county, and for cause of action alleges: That she is the duly appointed, qualified and acting executrix of the last will and testament of John Ferguson, deceased." It then proceeds to set forth the lease from Ferguson to defendant, alleges that the same has expired, that notice to surrender the possession has been given in accordance with the provisions of the statute, and the unlawful withholding of the property by the defendant. To this complaint a general demurrer was filed by the defendant, which was overruled by the Court.

The question, and the only question which it will be necessary for the Court to consider, relates to the sufficiency of the complaint. If the complaint was defective in substance, the demurrer should have been sustained, and the judgment entered upon it cannot stand.

The action is based upon a contract made with Ferguson, who, it is claimed, was the plaintiff's testator, and consequently it was necessary for the plaintiff to bring the action in her representative capacity. The averment in the complaint is, "that she is the duly appointed, qualified and acting executrix of the last will and testament of John Ferguson, deceased." It is claimed, on behalf of the respondent, that this allegation is sufficient within Section 456 of the Code of Civil Procedure. That section provides that "in pleading a judgment or other determination of a Court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made." Conceding, for the purposes of this decision, that the above provision is applicable to the case under consideration, yet the averments in the complaint are insufficient. In the case of *Young vs. Wright* (52 Cal. 410), the Court say: "But the answer avers that the judgment was 'duly rendered,' and it is contended that this was sufficient under Section 456 of the Code of Civil Procedure. That section provides that 'in pleading a judgment or other determination of a Court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.' A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerating him from an obligation which would otherwise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved, and they must be strictly performed. In this case the averment is not that the judgment was duly 'given or made,' but that it was duly 'rendered,' and we are inclined to think these are not equivalent terms. * * * The statute defines the precise terms on which a party pleading a judgment may be excused from stating in his pleading the jurisdictional facts; and to prevent the necessity of construing doubtful phrases in order to determine whether they are of equivalent import, the better practice is to require the pleader in such cases to pursue the statute strictly."

But, independent of the statutory provision, is the complaint sufficient? In the case of *Barfield vs. Price*, 40 Cal. 535, the Court say: "But if she intended to sue as execu-

trix the complaint has no allegation whatever showing that she is entitled to sue in that capacity." In the New York Courts the question now before us has been passed upon in a number of cases, some of which we will notice.

The case of *White vs. Joy*, 13 N. Y. 86, was the case of a receiver claiming title to property, and the Court there say: "The answer is apparently founded upon the principle that where a receiver would make title in pleading to a chose in action or other property which had belonged to a corporation which he represents, he must set out the facts showing his appointment. In such a case it will not answer merely to describe himself as receiver, or even under the former system to aver that he was duly appointed. He must set out the proceeding, so that the Court may see that the appointment was legal. In such a case the appointment of a receiver is a part of the plaintiff's title. It is like the granting of administration or of letters testamentary in a suit by executors or administrators; unless the fact is stated, the plaintiff does not show any right to sue." The case of *Beach vs. King*, 17 Wend. 197, is directly in point, and Mr. Justice Bronson, speaking for the Court, there says: "The defendant cannot be administrator unless letters of administration of goods and chattels and credits of the intestate have been granted to him by one of the Surrogates of this State. The proper mode of pleading the fact is by a direct allegation that such letters were granted. The defendant has not pursued that course, but pleads that he was duly appointed administrator. This allegation consists partly of matter of fact and partly of matter of law, and is not capable of trial. That the defendant was appointed administrator by somebody, or in some form, is a question of fact; but whether he was duly appointed or not is a question of law. The defendant should have stated how he was appointed, and then the Court could determine its sufficiency on demurrer, or if an issue to the contrary were joined upon the fact of having obtained letters, the question could be tried by a jury." (See also *Gillah vs. Fairchild*, 4 Denio, 83; *Forrest vs. The Mayor, etc.*, 13 Abbott's Pr. 350.) "It is conclusively settled by authority that a complaint commencing like the present, and containing no other allegations of the plaintiff's appointment, does not allege that he is an administrator, or show that he prosecutes in that capacity. The introductory statement is *descriptio personæ* only." (*Sheldon, Adm'r. vs. Hay*, 11 Howard's Pr. 14.)

The complaint in the above case commenced: "A. B., administrator of the goods, chattels, and credits of C. D., deceased, complains," etc. (See Abbott's Forms, vol. 1, p. 140.)

"Under the Code it is not necessary or proper for a plaintiff, who sues as executor or administrator, to make profert of letters testamentary or of administration, as was requisite under the former practice. But it is necessary that the plaintiff should allege in a direct and issuable form that he is executor or administrator. This should be done by alleging that the plaintiff is executor or administrator by virtue of certain letters testamentary or of administration regularly issued by a Surrogate of some county of this State, at the same time giving the name of the Surrogate or of his county, and the time and place at which letters were granted." (Wait's Practice, vol. 2, p. 374.)

We have already shown that the plaintiff was obliged to sue in her representative capacity; and to make out her right to bring the action, or to entitle her to recover in the action, she was required to allege in her complaint that she was the personal representative of the estate of John Ferguson, deceased. There was no sufficient averment of the fact in the complaint, and no right of action was shown in the plaintiff.

Judgment reversed.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed February 21, 1881.]

No. 6775.

FREDERICK ROEDING, RESPONDENT,

VS.

GEOBATTO PERASSO, APPELLANT.

FINDINGS IRRESPONSIVE TO PLEADINGS. If the findings do not respond to the issues presented by the pleadings, the judgment will be reversed.

Appeal from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

Pringle & Hayne, for appellant.

S. Rosenbaum, for respondent.

By the Court:

The findings in this case do not respond to the issues presented by the pleadings. The judgment and order are therefore reversed, and the cause remanded for a new trial. And by consent of parties in open Court it is ordered that the remittitur issue forthwith.

DEPARTMENT No. 2.

[Filed February 9, 1881.]

No. 6636.

THOMAS McVERRY, APPELLANT,
vs.
JAMES T. BOYD, RESPONDENT.

STREET ASSESSMENTS—INSUFFICIENT PUBLICATION OF RESOLUTION OF INTENTION—OMISSION TO PUBLISH ON FEBRUARY 22. Where the San Francisco street law required the resolution of intention to improve a street to be published for ten days, Sundays and non-judicial days excepted, and it appeared in a certain case that the first publication was on February 17, and there was no publication on February 22, at a time before the Code of Civil Procedure was so amended as to include it among the non-judicial days: *Held*, that the publication was insufficient and the assessment invalid.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

J. M. Wood, for appellant.

W. W. Cope, for respondent.

By the COURT:

Action to recover a street assessment. One ground of defense is that the resolution of intention was not published for ten days, Sundays and non-judicial days excepted, as required by law. It appears from the transcript that the first publication was on Thursday, February 17, and that there was no publication of the resolution on the twenty-second day of February. Was the twenty-second day of February a non-judicial day? Section 133, C. C. P., was at that time as follows: "The Courts of Justice may be held, and judicial business may be transacted on any day except as provided in the next section." Section 134: "No Court can be opened, nor can any judicial business be transacted on Sunday, on the first day of January, on the fourth of July, on Christmas, on Thanksgiving Day, or on a day on which the general or the judicial election is held, except for the following purposes," etc.

The sections are found in Article III of the Code of Civil Procedure, the heading of which is: "Judicial Days." The twenty-second of February was not made a non-judicial day by the foregoing section, and was not, therefore, a non-judicial day.

The publication was not made in the manner required by law, and the order is therefore affirmed.

DEPARTMENT No. 1.

[Filed February 23, 1881.]

No. 6611.

MARY SCHAEFER ET AL., APPELLANTS,

VS.

THE FRENCH SAVINGS AND LOAN SOCIETY ET AL.,
RESPONDENTS.

NO APPEAL FROM "ORDER AFTER FINAL JUDGMENT" UNTIL FINAL JUDGMENT ENTERED. Where an order was appealed from as an order made after final judgment, and the transcript did not contain any final judgment or show that one had in fact been entered: *Held*, that the appeal could not be maintained, and should be dismissed.

ORDER DIRECTING A JUDGMENT NOT ITSELF A JUDGMENT. An order directing a judgment to be entered is not itself a judgment.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

W. S. Cornwall and *J. T. Humphreys*, for appellants.

Jarboe & Harrison, for respondents.

By the COURT:

The order of August 2, 1878, was not appealable. (C. C. P., 939, 963.)

The transcript contains no final judgment. The order of the fifteenth November, 1878, denying plaintiff's motion to vacate and set aside the final judgment "entered on the second day of August, 1878," may have been made for the very reason that no such judgment had been entered. For aught that appears, plaintiff may have made the same mistake in moving to set aside which he made in appealing from the action of the District Court of the second of August, 1878, and have supposed that the order directing a judgment was a judgment. At all events, so far as appears to this Court, no final judgment has yet been entered in the District or Superior Court, and, as a consequence, no order has been made "after judgment" from which an appeal could have been taken.

Appeals dismissed.

DEPARTMENT No. 2.

[Filed February 18, 1881.]

No. 6583.

JAMES J. O'CONNOR, APPELLANT,

vs.

EDWARD FLYNN, RESPONDENT.

EXECUTOR CANNOT BARGAIN FOR PROPERTY SOLD AT PROBATE SALE BEFORE CONFIRMATION. Where a piece of property belonging to the estate of a deceased person was on proper proceedings ordered to be sold and was bid off at a fair price, but before the confirmation of the sale the executor made a bargain with the purchaser to buy it of him at a small advance on the price and did so: *Held*, in an action commenced by the devisees therefor, that the executor held the legal title to the property in trust for them, subject to a proper accounting for moneys paid out, less rents received, and any other proper transactions existing between the parties.

POWER OF EXECUTOR OR ADMINISTRATOR TO PURCHASE PROPERTY ONCE BELONGING TO ESTATE REPRESENTED BY HIM. The executor or administrator of an estate is not prohibited from buying from a purchaser at a probate sale, any of the property sold thereat; but he cannot do so, or bargain therefor, before such confirmation, for the reason that the law, without reference to the question of good faith, will not allow a person dealing with trust funds to place himself in a position antagonistic to the interests of his *cestuis que trust*.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Sawyer & Ball and *M. G. Cobb*, for appellant.

Charles McC. Delany and *J. W. Winans* for respondent.

MYRICK, J., delivered the opinion of the Court:

The plaintiffs, one of whom is an adult, the others infants, were devisees under the will of their father, Hugh O'Connor. The defendant was one of the executors of the will. In the course of administering the estate it became necessary to sell the real estate devised, and to that end, after due proceedings, the Probate Court made its order of sale. At the sale the defendant procured one Collins to bid off the property for him. At the hearing for confirmation an advanced bid was made, and the Court directed a re-sale. The defendant was desirous of purchasing the property, but was advised by his attorney that he could not do so, being one of the executors; that he could sell the property to the highest bidder, and after the completion of the sale he could purchase of such bidder, provided no previous agreement should be made between them. The real estate was put up at auction for a second sale, and at such sale one

J. C. Wade became the purchaser, for a fair price, viz., \$5,650. Wade did not bid off the property for or on account of defendant; they had no communication prior to the bidding relating to the sale. Defendant was not present at the sale, but kept away on purpose so that he might not seem to be interested. He made no effort, beyond the legal advertising, to induce bidders or bidding. Immediately and daily after the day of sale he made efforts to find Wade, in order to bargain with him for the purchase of the land, and some ten or fourteen days after the day of sale they met, and it was agreed between them that defendant should pay to Wade some \$350 advance and take a deed from him. This was before the confirmation of the sale by the Court. As soon as the sale to Wade was confirmed, he took a deed from the executors, and executed a deed to defendant, the defendant paying to him (Wade) the amount bid and the advance. At the confirmation, proof was offered to the Court that the price bid by Wade was a fair price, but the fact of the agreement between Wade and defendant for the purchase was not made known. The defendant received his deed from Wade at the same time and place that Wade received the deed from the executors. The dates are as follows: Second sale, May 4, 1870; return of sale, May 19, 1870; confirmation, May 25, 1870; deed from the executors to Wade, June 1, 1870; recorded June 3, 1870; deed from Wade to defendant, June 4, 1870.

Under this state of facts we are of opinion that defendant holds the legal title to the property in trust for the plaintiffs, subject to a proper accounting for the money paid for the purchase, and for repairs, etc., less rents received, and any other proper transactions that may exist between the parties. If defendant had waited until after the sale had been confirmed, he might then have bargained for the property. We know of no reported case holding that an executor or administrator is prohibited from purchasing after the confirmation, even though he then be in office. But in this case the executor, before the confirmation, before even the sale was reported, bargained with the purchaser, and thus placed his interest in conflict with his duty. His interest was to have the property confirmed at the lowest possible price; his duty was to have the property bring the highest price. It may be said, as the Court below found, that defendant acted in perfect good faith, so far as his intentions were concerned; yet so strict is the law in regard to persons dealing with trust property and funds, that it will not permit them to place themselves in a position antagonistic to the interests

of their *cestuis que trust*. At the confirmation, defendant's interests were antagonistic to the interests of plaintiffs; if some person had proposed to him to make an advanced bid, it would have been to his interest to discourage the same. Not until confirmation did the sale become complete. A text writer, speaking of the duties of a trustee, says: "It is not enough, in the eye of the law, to protect him, that he did not mean to prejudice his beneficiary. If his act is open to suspicion, he will be held to have violated his duty, which is not to strive to do questionable things conscientiously, but wholly to refrain from all action or intermeddling in them of what nature soever." See also *Michoud vs. Girod*, 4 Howard, U. S. 557, where it is said: "The inquiry is not, whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestuis que trust*, and a re-sale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the Court."

Judgment and order reversed and cause remanded, with instructions that the Court below take an accounting between the parties upon the following basis:

Credit the defendant with the amount for which the property was sold to Wade, viz., \$5,650; also with the amount paid by him for necessary repairs, taxes and insurance; and for buildings erected by him on the premises, if any, since his purchase; charge to the defendant the amount received by him for rent; also the use and occupation; balances to bear interest at the statutory rates, with annual rests; provided, however, that the cost of buildings erected by the defendant shall be borne only by the rents and use and occupation of the premises, and is not to be a charge upon the land; and if the cost of such new buildings exceed the rents and use, the defendant may have the right to remove them within a proper time, to be fixed by the Court below, he being charged with the value of the use of the land, and with the rents and use of the buildings not removed.

The Court below will then decree that defendant holds the legal title of the premises in trust for the plaintiffs, and that upon the payment by plaintiffs to defendant of the amount which may have been found due him, such payment to be made within such reasonable time as the Court below may fix, the defendant convey to the plaintiffs the premises; and if such payment be not made, the premises be sold at public auction, any of the parties hereto having the right to purchase, and from the proceeds of such sale the amount due

defendant be paid to him, the surplus to be divided equally between the plaintiffs.

The defendant to bear all costs.

We concur: Morrison, C. J., Thornton, J.

DEPARTMENT No. 2.

[Filed February 19, 1881.]

No. 6692.

CELESTE RICHARDSON, APPELLANT,

VS.

LEWIS P. SAGE, RESPONDENT.

QUESTION OF FRAUD—APPLICATION OF ADMINISTRATOR TO SELL REAL ESTATE TO PAY DEBTS, WHEN PERSONAL ESTATE SUFFICIENT. In an action against an administrator, charging him with fraud in having, in 1859, procured from the Probate Court an order to sell real estate to pay debts based upon the fact that the final account, filed in 1875, showed that the proceeds of the personal estate sufficed to pay all the debts and left \$21.75 over: *Held*, that the facts stated did not of themselves make out a case of fraud or false suggestion on the part of the administrator, and that a finding in his favor by the Court below should be affirmed.

Appeal from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

George W. Tyler, for appellant.

Wm. H. Patterson, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

It is alleged in the complaint filed by the above plaintiff, that the defendant, as the administrator of the estate of one Anna Dubois, procured an order of the Probate Court, directing the sale of certain lands belonging to the estate, to pay the debts thereof, when there was sufficient personal property in the hands of the administrator to satisfy all existing claims against the estate. The averment is that "in consequence of the false and fraudulent representations and showings made by the defendant to the Court, at the time of hearing the same, the Court was induced to, and did then and there make an order directing the real estate of said estate to be sold." It appears from the facts found in the case, that after paying all the debts due, there remained in the hands of the administrator of the personal property the sum of \$21.75, and that is the only circumstance in the case which tends to prove fraud on the part of the administrator. The case comes before us on the pleadings and findings of the Court below, and one of the findings is "that it does not

appear from the evidence that the defendant, as administrator, filed said petition for the sale of lots with intent to defraud said estate or the beneficiaries thereof, or that it was filed and presented otherwise than in good faith, * * * and that there was no actual or constructive fraud on the part of the defendant."

It appears from the final account that the administrator had in his hands of the personal assets twenty-one dollars and seventy-five cents more than was required to pay all the claims allowed against the estate. But it should be remembered that the petition for the sale of the real estate was filed in 1859, and the final account was rendered in 1875. It is quite possible that the sum in the hands of the administrator at that time was the result of interest which had accumulated upon the money, and it may also be true that the expenses of administration may have been justly and honestly overestimated by the administrator in his petition for sale. There is nothing in the case to show that the surplus did not result in one or the other of these ways.

It does not appear that any false suggestion was made to the Court, with a view to influence its action; but, on the contrary, it appears that the precise condition of the estate, so far as it was known to the administrator, was before the Court at the time the order of sale was made; and the most that can be said, in reference to the action of the administrator in procuring the order is, that he was mistaken as to a question of fact. We are not prepared to say that he was mistaken; but, conceding that he was, this fact does not of itself establish the charge of fraud.

Appellant relies upon a decision of Chancellor Kent, in the case of *Hart vs. Ten Eyck*, 2 Johns. Ch. R. 62, but an examination of the facts of that case will show a very different case from the one now under consideration. It is there said: "If an administrator omits to file an inventory of the goods of the deceased, pursuant to the statute, it is a strong circumstance in support of the charge of improper conduct." It is not pretended that there was any such omission in this case.

"If an administrator exhibit an untrue account of the personal estate of the deceased, by which he fraudulently obtains an order for the sale of the real estate, he must not account for the personal effects omitted in his statement, but is amenable for the real estate sold, and that according to its value at the time of filing the bill against him."

In this case the plaintiff, as the heir of Anna Dubois, is seeking to charge the administrator with the value of the property sold under the order of the Probate Court, without

proving any fraud whatever on the part of the administrator. In the case of *Hart vs. Ten Eyck*, referred to above, the Chancellor says: "I shall always be extremely averse to hold such characters (administrators and trustees) responsible on slight grounds, or where there is evidence of fair and upright intention. But if the facts necessarily lead to the conclusion that the administrator has been guilty of gross negligence, or of premeditated and fraudulent concealment and disposition of the estate of the infant, it will be equally my duty, however painful the performance of it, to animadvert upon such conduct with a freedom and severity due to truth and justice."

In the case now under consideration there was no gross negligence or fraudulent suggestion or concealment, and upon the authority of the foregoing case, the administrator should not be charged with damages.

Judgment affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed February 23, 1881.]

No. 5496.

L. L. ROBINSON ET AL., APPELLANTS,
VS.

THE PITTSBURG RAILROAD COMPANY, RESPONDENT.

RAILROAD OCCUPYING LINE OF WAY DIFFERENT FROM THAT CONDEMNED—

INSUFFICIENT FINDINGS. In an action of ejectment against a railroad company to recover the land occupied by its track, where it appeared that the company had condemned a different line of way and paid the price fixed, but it set up in defense that it had the license and permission of the owner to use the line occupied and paid the money for the same; and there was judgment for the company, but the findings did not show whether or not the money was paid for the line as occupied, or whether or not the license or permission was a revocable one: *Held*, that the findings did not cover the issues or justify the judgment.

Appeal from the District Court of the Fifteenth Judicial District, Contra Costa County.

E. L. Gould, for appellants.

Wm. H. Patterson, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action is to recover certain lands occupied by defendant with its track, etc., and with certain railroad buildings. The

plaintiffs deraigned title through a Mexican grant, upon which a patent was issued by the United States October 8, 1872. The action was commenced June 27, 1874.

It is admitted that for a considerable distance the railroad of defendant was constructed, and now is, upon a line different from the line or tract of land condemned to public use, for railroad purposes, by proceedings initiated by defendant, and through which defendant claims to have acquired a right to the possession as against the title of plaintiffs. For the possession of the land in the occupancy of defendant which was not condemned, plaintiffs herein were entitled to have judgment, unless facts were alleged in the answer, and found by the Court, which constituted an affirmative defense.

The only portions of the answer which are claimed to allege such defense are as follows:

"And for a further and separate defense, defendant avers that it entered upon the lands in the complaint described on or about June 1, 1868, with the license and permission of plaintiffs, for the purpose of constructing and maintaining a railway through and over the same; that thereafter the defendant, with the knowledge and consent of plaintiffs, afterwards, to wit, July 10, 1868, surveyed and located a route for a railway over the lands described in the complaint; that afterwards, to wit, on the first day of August, 1868, defendant paid to plaintiffs for said right of way, and for the privilege and right of maintaining a railway depot and appurtenances connected with a railway, where the same is now located, upon and along the lands described in plaintiffs' complaint, for the period of fifty years then next ensuing, the sum of \$5,000 gold coin, which sum was accepted and received by plaintiffs as the consideration for granting such right and privilege, and said plaintiffs did then, in consideration of such payment, grant to defendant such privilege and right of way, and thereupon defendant took possession of the route for a railway, so, as aforesaid, surveyed by it, and immediately thereafter expended a large sum of money, to wit, \$5,000 and upwards, in the construction of a railway track, switches, turn-table, sheds, etc., for the convenient management and operation of a railway, all of which was well known to plaintiffs on the tenth day of September, 1868, and from thence hitherto."

There is no finding that defendant did or did not pay to plaintiffs, on the 1st of August, 1868, or on any other day, \$5,000, or any sum, "for the privilege and right of maintaining a railway depot and appurtenances connected with a railway where the same is now located, * * * for the period

of fifty years then next ensuing," or that the same was or was not "accepted and received by plaintiffs as the consideration for granting such right or privilege," or that plaintiffs did or did not "then and there grant to defendants such privilege and right of way."

No force is added to the first of the foregoing findings by the statement that the consent of plaintiff Robinson was with a certain intention. The fact found is that the buildings were erected with the consent of Robinson. The last finding amounts to no more, except so far as it consists of matters of law, as that, he "recognized" the land in possession of defendant as "its property" and "waived the error" in the location of the railroad. Even if these matters could be treated as facts, there is no averment in the answer that Robinson had "recognized" the defendant as owner or "waived error."

Assuming that defendant entered on the lands of plaintiffs with the latter's permission, there is no averment in the answer, nor any fact found which would establish that the license was not revocable at the will of the licensors.

The allegations in the answer—separated from the matters alleged upon which the Court below omitted to find—did not justify a judgment in favor of defendant. The Court failed to find as to some of the averments of the answer, and did find with respect to other matters entirely beyond and without the issues made by the pleadings.

Judgment reversed and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

In the Superior Court

OF THE CITY AND COUNTY OF SAN FRANCISCO.

DEPARTMENT No. 10.

KEANE, PLAINTIFF,

VS.

GIN GON ET AL., DEFENDANTS.

UNLAWFUL DETAINER AFTER RENT DUE—REQUISITES OF DEMAND. To render the holding of premises after rent due, unlawful, under Section 1161 of the Code of Civil Procedure, the demand therein provided for must specify a time for compliance therewith. A mere demand for the amount of rent claimed or delivery of possession, without specifying a time for compliance, is not sufficient.

E. B. Drake, for plaintiff.

T. W. Reardon, for defendants.

HALSEY, J., delivered the opinion of the Court:

This is an action of unlawful detainer under sub. — of Section 1161, C. P. P: The demand was for payment of the rent (giving the amount claimed) or delivery of possession.

The demand is objected to as insufficient, because no time for compliance therewith is specified. Counsel for plaintiff contends that the only essential things in the demand are the amount of the rent, the requirement for its payment, or on default thereof the surrender of possession, and that thereafter, if in fact three days elapsed, the right of action accrued, that the defendants are bound to know what remedies were provided by law for their neglect; and furthermore, that the service of the demand was in effect the commencement of the suit. But the commencement of an action is defined to be the filing of the complaint and the issuance of the summons.

Brumagim vs. Spencer, 29 Cal. 661, is relied upon by plaintiff's counsel as sustaining the validity of the notice. The only point decided in that case was that demand for payment of rent and delivery of possession on default thereof, could be made at one time. The constituents of the demand were in no wise involved. *Burns vs. Bryant*, 31 N. Y. 456, is also invoked to sustain the demand; that was a notice to quit, and it referred explicitly to the statute under which the proceedings were taken, and thus admonished the defendant of the proceedings which would be resorted to in case of his neglect. That time for compliance with the demand must be either expressed or denoted in it with reasonable certainty or exactness was decided in several cases in New York and Massachusetts, to wit: in *Wright vs. Mosher*, 16 How. Pr. R. 460; *Currier vs. Barker*, 2 Gray, 224; *Sandford vs. Harney*, 11 Cushing, 93; and *Oakes vs. Munroe*, 8 Cushing, 282.

In the case last cited, Shaw, C. J., held that the demand, which was under a statute similar to ours, forms the *basis* of the action. And so, I think, should it be held here instead of being considered at the *commencement* of suit.

The demand in this case seems to me, to be in effect, one for payment of rent or delivery of possession forthwith, which Justice Shaw held to be unauthorized by the particular statute, and one not warranting summary proceedings. So I think of the demand in this case.

Let judgment be entered for the defendants.

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Supreme Court of California.

DEPARTMENT No. 1.

[Filed February 24, 1881.]

No. 7139.

LEEVE DISTRICT NO. 1 OF SACRAMENTO COUNTY,
RESPONDENT,
VS.

HERMAN HUBER, APPELLANT.

BILL OF EXCEPTIONS TO STRIKING OUT PART OF ANSWER, NOT PRESENTED TILL THREE MONTHS AFTERWARDS, SHOULD NOT BE ALLOWED. Where an order to strike out a portion of an answer was made November 14, 1879, and a bill of exceptions embodying an exception by defendant to such order was dated March 26, 1880, and was settled and allowed against plaintiff's objection, who had reserved the right to object, that the same was not presented in due time: *Held*, that plaintiff's objection was valid and should have been allowed.

ACT OF MARCH 20, 1878, ORGANIZING SACRAMENTO LEEVE DISTRICT NO. 1—NO LANDS TO BE ENTIRELY RELIEVED OF ASSESSMENT. Under the Act of March 20, 1878, to organize Levee District No. 1 of Sacramento County (Stats. 1877-8, p. 853), assessments in ordinary cases of levee work are to be made by an assessor upon all the lands in the district; and in cases where the trustees adjudge that one portion of the district will be more benefited by a scheme projected than another, assessments are to be made by commissioners upon all the lands, in proportion to the benefit which will result from such works; but there is nothing in the Act which authorizes the commissioners to relieve any portion of the lands within the district from all assessments.

Appeal from the Superior Court of Sacramento County.

John W. Armstrong, for appellant.

George A. Blanchard, Dunlap & Van Fleet, and *H. L. Buckley*, District Attorney, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The District Judge ought to have sustained plaintiff's ob-

jection to the settlement or allowance of an exception to the ruling of the Court striking out a portion of defendant's answer. The proposed bill, containing such exception, was not presented until more than three months after the ruling or decision was made. The order to strike out was made November 14, 1879, and the "proposed bill" is dated March 26, 1880, and of course could not have been presented until that day. It appears from the Judge's certificate that, at the settlement of the bill, plaintiff's attorney, "having the reserved right so to do, objected to the allowance of that portion of the bill relating to the striking out of a portion of defendant's answer, etc., * * * on the ground that the same was not presented in due time."

The Act of March 20, 1878, to organize Levee District No. 1, of Sacramento County (Stats. 1877-8, p. 853), defines the boundaries of the levee district, and provides for the election of three Trustees, one Assessor, and one Tax Collector. The seventh section provides that the Assessor shall assess the real estate and personal property in the district, etc. In the case before us the assessment was made of three Commissioners appointed by the Supervisors.

The fifteenth section of the Act reads: "If the Board of Trustees shall adopt any plan or scheme, or project any work of reclamation * * * which, in their judgment, is more beneficial to one part of the district than to another, they may report such plan to the Board of Supervisors of said county, in the manner provided by Section 3455 of the Political Code. All subsequent proceedings for the purpose of assessing and collecting the moneys necessary to complete the work specified in said report shall be prosecuted under Sections 3456, 3459, 3460, 3461, 3462, 3463, 3465 and 3466 of the Political Code." Section 3456 of the Political Code provides for the appointment "by the Board by which the district was formed" of three Commissioners, "who must view and assess upon the lands situated within the district a charge proportionate to the whole expense and the benefits which will result from such works," etc. The Act of 1878 does not provide for any report of a plan, except where the Trustees have adjudged that one portion will be more benefited by the scheme projected than another. In the case at bar the Trustees did so adjudge—although their report, assuming it to be a plan, did not indicate their judgment as to which portions of the lands would be more benefited—and it may be assumed (without deciding the question) that the report or plan gave to the Supervisors power to appoint Commissioners. It will be seen by reference to Section 7 that,

n ordinary cases, it is the duty of the Assessor to assess all the real property in this district. This, separated from the fifteenth section, would seem to make the Levee District a district for taxation or assessment purposes as well. It is, perhaps, a legislative declaration (which by all the cases is held conclusive) that all the lands within the district will be benefited.

In addition to what has already been conceded, for the purposes of the argument, it may further be assumed that the Legislature has power either to establish the boundaries of an assessment district or to authorize the Supervisors of a county to appoint commissioners to establish such boundaries, and whose report, showing what lands they have in fact assessed, shall fix and determine the lands constituting the assessment district. Assuming still further (but not so deciding, because the determination of the question is not herein necessarily involved) that Section 7 defines an assessment district co-extensive with the levee district, it might be doubted whether the Legislature had power in the same Act to provide for the election either of Trustees or Commissioners with authority to determine that some of the lands (of which it has been legislatively declared that they would be benefited by the works of reclamation) would in fact not be benefited at all. But assuming, for the purposes of this decision, that the Legislature had power to invest the Commissioners appointed by the Board of Supervisors with authority to relieve a part of the tracts of land within the levee district of all assessment—the question still remains: Has the Legislature done that thing? We are of opinion that the language employed by the Legislature will not permit such construction. The language of Section 15 of the Act of 1878, is: "If the Board of Trustees shall adopt any plan or scheme which, in their judgment, is more beneficial to one part of the district than another, they shall report such plan," etc. And Section 3456 of the Political Code reads: "The Board * * * must appoint three Commissioners, who must view and assess upon the lands situated within the (levee) district a charge proportionate," etc. There is nothing in the language used in either of these sections which necessitates a construction which alone can give validity to the assessment sought to be enforced in this action. The very words "more beneficial," indicate that all are benefited in some degree, and the power to assess "upon the lands" of the district is a power only to assess all the lands.

Judgment and order reversed and cause remanded.

We concur: Ross, J., Morrison, C. J.

IN BANK.

[Filed February 24, 1881.]

No. 10,557.

THE PEOPLE, RESPONDENT,

VS.

ANDREW JOHNSON, APPELLANT.

CRIMINAL LAW—DEFENDANT WITNESS MAY BE ASKED AS TO PREVIOUS CONVICTION, NOTWITHSTANDING ADMISSION THEREOF BY PLRA. Where a defendant charged with burglary and also with previous conviction of felony was put on trial after the repeal of April 9, 1880, of Section 1025 of the Penal Code; pleaded not guilty of the burglary but admitted the previous conviction, and having elected to become a witness on his own behalf and testified to a state of facts tending to exculpate him, was asked on cross-examination if he had not been previously convicted of a felony, and was compelled to answer against his objection: *Held*, that the question was proper as going to his credibility as a witness.

Appeal from the Superior Court of the City and County of San Francisco.

Darwin & Murphy, for appellant.

A. L. Hart, Attorney-General, for respondent.

Ross, J. delivered the opinion of the Court:

The defendant was charged by information with the crime of burglary, and was convicted. The information also charged that he had been previously convicted of several other designated offenses. On his arraignment the defendant admitted that he had suffered the previous convictions as alleged, but entered a plea of not guilty to the charge of burglary. On the trial, after the case of the prosecution had been closed, the defendant, for the purpose of showing, if he could, that he did not commit the burglary, testified in his own behalf that he was not, on the night it was committed, nor was he ever, in the house in which the offense was committed, but was at that time in bed in the house of one Morse, and that he did not commit the offense, or have any connection with its commission. On cross-examination the District Attorney asked the defendant this question: "Were you not convicted of a felony in the Municipal Criminal Court of this City and County of San Francisco prior to this charge?" To which the counsel for the defendant objected on the ground that the question was "incompetent, irrelevant and immaterial, and not proper cross-examination, and upon the further ground that said former conviction is

directly charged in the information in this case, to which defendant has answered, and that it is not a legitimate subject of inquiry before the jury." The Court overruled the objections and compelled the defendant to answer the question, which he did in the affirmative, to which ruling defendant reserved an exception.

When the Penal Code was adopted, provisions were inserted in it providing for the greater punishment, on conviction, of such persons as had been previously convicted of criminal offenses than was provided for similar offenses where there had been no such previous conviction, and by Section 969 the manner of charging such previous convictions was pointed out.

By Section 1158 of the same Code it was provided that "whenever the fact of a previous conviction is charged in an indictment, the jury, if they find a verdict of guilty, must also find whether or not the defendant had suffered such previous conviction." In 1874 the Legislature amended this section so as to make it read as follows: "Whenever the fact of a previous conviction of another offense is charged in an indictment, the jury, if they find a verdict of guilty of the offense for which he is indicted, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: 'We find the charge of previous conviction true,' or 'We find the charge of previous conviction not true,' as they find the defendant has or has not suffered such conviction."

Thus it will be seen that under Section 1158, as it originally stood, the question of previous conviction had to be submitted to the jury; and by this section, as amended in 1874, the defendant was given the right to admit such charge, in which event the question of previous conviction was not to be submitted to the jury. To make this still clearer, the Legislature on the same day added a new Section (1025) to the Penal Code, in these words:

"When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer shall be entered by the Clerk in the minutes of the Court, and shall, unless withdrawn by consent of the Court, be conclusive evidence of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the Clerk in the minutes of

the Court, and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issue upon the plea of 'not guilty,' or in case of a plea of 'guilty,' by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads 'not guilty,' and answers that he has suffered the previous conviction, the charge of the previous conviction shall not be read to the jury, nor alluded to on the trial.

Whether the concluding clause of this section, had it remained in force, as seems to be supposed by counsel in the case, since their argument is mainly based on it, would so far modify the rules of evidence as to prohibit the question under consideration, need not be determined, since the section itself was repealed by the Act approved April 9, 1880. (Amendments to Penal Code, page 19.) Section 2051 of the Code of Civil Procedure provides:

"A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony."

And Section 1102 of the Penal Code declares:

"The rules of evidence in civil actions are applicable also in criminal actions, except as otherwise provided in this Code"—the Penal Code.

By Section 1323 of the Penal Code it is provided that:

"A defendant in a criminal action of proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding."

We discover nothing in this section inconsistent with the provisions of Section 2051, of the Code of Civil Procedure. The question as to previous conviction is only permitted to go to the credibility of the witness. The fact that a defendant has been previously convicted of other criminal offenses is, of course, no evidence that he committed the particular offense for which he may be on trial. The consideration urged by counsel for appellant, that it is a difficult matter for jurors in cases where the defendant has been previously convicted of a criminal offense, to divest their minds of that

circumstance, and the consequent danger of such considerations influencing the determination of the particular charge on trial, is a question for the Legislature. Under the existing statutes there is nothing—taking the present case out of the rules—applicable to other witnesses.

There is nothing in *People vs. Brown*, 72 N. Y. 571, in conflict with the views here expressed. The question propounded to the defendant and considered by the Court in that case was: "How many times have you been arrested?" Whether the question had any bearing on the credibility of the witness was not determined, but the objection to it was sustained on another ground, which was distinctly taken—namely, that of privilege.

Finding no error in the record, the judgment and order are affirmed.

We concur: McKinstry, J., Myrick, J., Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed February 17, 1881.]

No. 6769.

P. B. LADD, EXECUTOR, ETC., RESPONDENT,
VS.

JOHN PARNELL AND NICHOLAS WYNNE, APPELLANTS.

JUDGMENT ON MOTION AGAINST SURETIES ON APPEAL UNDERTAKING—SECTION 942 OF CODE OF CIVIL PROCEDURE CONSTITUTIONAL. The provisions of Section 942 of the Code of Civil Procedure, allowing a judgment on motion against the sureties on an undertaking on appeal, are not unconstitutional; and if such sureties are duly notified of such motion in a proper case and fail to appear, judgment by default may be entered against them.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

J. C. Bates, for appellants.

P. B. Ladd, for respondent.

By the COURT:

The judgment in this cause is affirmed. The sureties on the undertaking upon appeal were notified of the motion for judgment and failed to appear. We see nothing in the point that the 942d Section of the Code of Civil Procedure, allowing judgment on motion against the sureties where they have subscribed such an undertaking as is required by that section, is unconstitutional.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed February 8, 1881.]

No. 6224.

J. S. DYER, APPELLANT,

VS.

J. E. CHASE ET AL., RESPONDENTS.

STREET ASSESSMENTS—DIFFERENT JUDGMENT ORDERED ON FINDINGS. Where a judgment for defendants in a street assessment case was not supported by the findings, but they showed that it should have been the other way: *Held*, that such judgment should be reversed, and a judgment ordered on the findings for plaintiff.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

This was an action to foreclose the lien of a street assessment upon a lot on the southeast corner of Vallejo and Polk street, in the City and County of San Francisco. The street work was the grading of Vallejo, from Polk to Franklin streets. There had been a petition of more than one-half in frontage of the property owners, containing a diagram of the property liable to assessment. The grounds of the decision for defendants were, that the petition was not sufficient to give jurisdiction to the Board of Supervisors to order the work done; and that the contract and assessment were void for want of jurisdiction. The particulars in which the petition was held insufficient were not stated.

J. M. Wood, for appellant.

Edmonds & Reynolds, for respondents.

By the COURT:

This is an appeal from a judgment entered in favor of defendant in an action upon a street assessment. There was no appearance or points and authorities filed on behalf of the respondents, or of any of them, on the hearing in this Court. The findings of the Court are quite voluminous, and do not seem to us to support the judgment. On the other hand, we think that the judgment upon the findings should have been for the plaintiff.

Judgment reversed, and cause remanded to the Superior Court of the City and County of San Francisco, with directions to enter a judgment upon the findings in favor of the plaintiff, as prayed for in the complaint.

DEPARTMENT No. 2.

[Filed January 20, 1881.]

No. 7343.

J. H. STUFFLEBEEM ET AL., RESPONDENTS,

vs.

D. H. ARNOLD, APPELLANT.

PAROL EVIDENCE AS TO CONSIDERATION OF EXECUTION OF RELEASE. In an action against a Sheriff to recover money received by him in an attachment case, where he pleaded a release, which had been executed in consideration that he would turn over the property seized or its value in money, and it became a question whether he had done so: *Held*, that parol evidence as to the consideration upon which the release had been executed did not tend to vary its terms, and was admissible.

Appeal from the Superior Court of Colusa County.

It appeared in this case that L. Jacobi brought an action against John Bashore in Colusa County, and in that action the defendant, as Sheriff of the county, attached the property of plaintiffs. The latter then commenced an action to recover the property attached. A settlement of the action of *Jacobi vs. Bashore* followed, and about the same time a settlement of the other action was negotiated, consisting of a release of defendant and Jacobi from all liability to plaintiffs. The consideration of the release was that defendant agreed to deliver to plaintiffs "all the property taken, in amount, kind and value, or its equivalent in money." Among the property held under the attachment was the sum of \$790.80 in money. The plaintiffs, after the execution of the release, dismissed their action, and the defendant delivered up the goods left in the store of plaintiffs, but refused to deliver the money which he had received on a sale of a portion of the goods seized. This action was then commenced to recover the money so retained with interest and the rent of the store. Defendant set up the release, and plaintiffs were allowed to show by parol the consideration upon which it was executed.

Naphtaly, Friedenrich & Ackerman, and Goad, Albery & Goad, for appellant.

Hart & Hart, for respondents.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover of defendant the sum of eight hundred and thirty-five dollars for money had and received for plaintiffs, and four hundred and twenty-six dollars for rent of a house for a term set forth in the complaint. The defendant denied all indebtedness, and pleaded

a release of the demands sued on. The cause was tried by the Court, and judgment passed for the plaintiffs. Defendant moved for a new trial, which was denied, and the defendant appealed from the judgment and order.

We have examined the transcript and find no error. The evidence offered as to the consideration on which the release was executed by plaintiff was admissible. It did not tend to alter the terms of the release.

There was no findings of fact in the case. The evidence tended to sustain the decision of the Court. On the controverted points there was some conflict in the evidence, but it was sufficient to sustain the decision.

Judgment and order affirmed.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed February 24, 1881.]

No. 6714.

FRANCIS AVERY, PETITIONER,

VS.

THE SUPERIOR COURT OF THE COUNTY OF
CONTRA COSTA.

RIGHT TO MESNE PROFITS THE LEGAL CONSEQUENCE OF RECOVERY IN EJECTMENT. Where a person, having a patent to land, recovered in ejectment for the same, and then commenced against the same defendant a separate action for mesne profits; and upon a showing that an action had been commenced in the U. S. Circuit Court to set aside the patent as void, a stay of proceedings in such action for mesne profits was granted until the action to set aside the patent should be determined. *Held*, that the recovery in ejectment established the title to the land and that the right to recover mesne profits was a legal consequence to such judgment establishing the title, and that the pendency of the action in the U. S. Circuit Court constituted no good reason for the stay of proceedings.

IMPROPER STAY OF PROCEEDINGS—MANDAMUS FROM SUPREME COURT THE PROPER REMEDY. Where a District Court had improperly granted a stay of proceedings in an action pending before it: *Held*, that it could be compelled by mandamus from the Supreme Court to proceed with the trial of the cause, and that such proceeding was the proper remedy.

Mandamus.

B. S. Brooks, for petitioner.

This is an application for a writ of mandamus to compel the Court below to proceed with the trial of the case of *Avery vs. The Black Diamond Coal Mining Company*. It appears from

the petition and answer that on the tenth day of August, 1871, an action was brought by Avery against the Black Diamond Coal Mining Company for the recovery of a certain tract of land situate in the County of Contra Costa, described as the north half of section 8, township 1 north, range 1 east, Mount Diablo meridian; and such proceedings were had that plaintiff obtained a judgment in said action on the first day of April, 1873. From that judgment an appeal was taken to the Supreme Court, and on the sixteenth day of January, 1877, the judgment of the Court below was affirmed. On the eleventh day of July, 1877, plaintiff commenced an action to recover damages which he had sustained by reason of the withholding of the possession of the premises by the defendant, and the taking from said land of coal, and for waste committed thereupon. In that action issue was joined, and the plaintiff proceeded to take testimony *de bene esse*. On the tenth day of June, 1878, the District Court granted an order requiring plaintiff to show cause why all further proceedings in the action to recover mesne profits should not be stayed until the further order of the Court, or until a certain cause then pending in the Circuit Court of the United States for the Ninth Circuit, District of California, wherein the United States is plaintiff and Francis Avery and one John Mullan are defendants, is tried and decided. (The foregoing is a suit to annul the patent under which Avery derives title, and upon which his recovery was had in the case brought by him against the Black Diamond Coal Mining Company, referred to above.) On the sixteenth day of September, 1878, the Court below ordered that all further proceedings in the action brought by Avery against the Black Diamond Coal Mining Company be stayed until the cause pending in the Circuit Court of the United States is tried and determined, or until the further order of the Court. The said cause has stood upon the calendar of the Court from term to term, and the plaintiff has answered ready when the same has been called; but the Court has refused to try the case, or to allow the plaintiff to proceed therein.

It is claimed in the suit brought in the Circuit Court of the United States, that the patent under which Avery derives title, and upon which he recovered in the action brought by him against the Black Diamond Coal Mining Company, is void. But we cannot perceive how an adjudication to that effect can affect Avery's right to a recovery in this action for mesne profits. The title to the land was put in issue in the pleadings, and the judgment in the action of ejectment established Avery's title to the land, and the right to recover

the rent is a legal consequence of the judgment establishing his title. (*Caperton vs. Schmidt*, 26 Cal. 479; *Doyle vs. Franklin*, 40 Cal. 106; *Byers vs. Neal*, 43 Cal. 210.)

The pendency of the suit of the United States against Avery in the Circuit Court of the United States constituted no good reason for staying proceedings in the case of Avery against the Black Diamond Coal Mining Company, and the only remaining inquiry is, whether the Court can be compelled by mandamus to proceed with the trial of the cause.

The case of *The People, etc., ex relatione Coberly vs. Scates*, 3 Scammon, 351, presented the following state of facts: By consent of counsel, a criminal case, pending in the County of St. Clair, in the State of Illinois, was transferred to the County of Perry, and when the case was called for trial in that county the State's attorney moved the Court to dismiss it for the reason that it was not properly in that Court. This motion was allowed, and the Court refused to proceed with the trial of the cause. On appeal to the Supreme Court it was held that the order of dismissal was improperly entered, and the Court below was ordered by peremptory mandamus to proceed with the trial of the cause. To the same effect is the case of *The People, etc., ex relatione Teale vs. Pearson*, Judge Cook of the Circuit Court, 1 Scammon, 458. In that case the Court below granted a continuance on grounds that the Supreme Court held insufficient, and a writ of mandamus was ordered to compel the Circuit Court to proceed with the trial of the cause.

But the case of *Rhodes vs. Craig*, 21 Cal. 419, appears to us to be directly in point. Field, C. J., delivering the opinion of the Court in that case, says:

"It is difficult to perceive upon what ground the order staying the proceeding in this action can rest, except the bare possibility that the officers of the General Land Office at Washington may come to a different conclusion from that of the authorities of the State as to the validity of the location of the school warrant upon which the patent to Doll was issued. But even if such a conclusion should be reached, no defense based thereon could be interposed to the present action. * * * The difficulty, however, with the present case is that no appeal lies from the order of the Court. It is not an injunction against the parties in another action; it is a simple order staying proceedings in the same action. The remedy of the plaintiff is not by appeal, but by an application for a mandamus to compel the Court to proceed."

Writ granted as prayed for.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed February 24, 1881.]

No. 10,596.

THE PEOPLE, RESPONDENT,

VS.

WILLIAM CLARKE, APPELLANT.

INARTIFICIAL INFORMATION SUFFICIENT IF GOOD IN SUBSTANCE. An information, though inartificially drawn, and though it does not state facts by any means as concisely as it ought to, is nevertheless sufficient if good in substance.

Appeal from the Superior Court of Monterey County.

Defendant was charged by information with having published a libel upon Alice M. Cullman by writing a false and defamatory letter concerning her, and causing it to be placed in an open place on her premises. The defamatory matter was an attempt to connect her with one Chona Samora, a notorious character of Salinas City, who had been convicted of maintaining a public nuisance. The information set forth at great length and in a rambling manner all the circumstances, even the most remote, supposed to bear upon the charge, and contained copies of the indictment against, and sentence, of Chona Somora.

Charles W. Quilty, for appellant.

A. L. Hart, Attorney-General, for respondent.

By the COURT:

The defendant was charged, by information, with the crime of libel. He filed a demurrer to the information, which was overruled, whereupon he entered a plea of "not guilty." Subsequently he withdrew that plea and entered a plea of "guilty," after which judgment was pronounced against him. From the judgment he brings this appeal on the ground that the facts stated in the information are insufficient to constitute a public offense.

We have considered the information, and while it is true that it is inartificially drawn, and that the facts constituting the offense might, and ought to, have been more concisely stated, we are nevertheless of the opinion that it is good in substance.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed March 5, 1881.]

No. 6669.

JOSEPH C. COLLINS, APPELLANT,

VS.

CLARENCE F. TOWNSEND, RESPONDENT.

CONTRACTS—DEFENSE OF FALSE REPRESENTATIONS MUST SHOW RESCISSION WITHIN REASONABLE TIME. Where a person purchased certain shares in homestead associations, gave his note payable in installments therefor, and left his shares with the vendor as collateral security; and, after paying a portion of the installments, discovered that he had been defrauded by false representations and refused to pay anything more; but for three years took no step, either by notice or otherwise, to rescind the contract: *Held*, in an action against him on the note, that he could not avail himself of the defense of false representation for the reason that he had not taken any steps to rescind the contract within a reasonable time.

FRAUDULENT CONTRACTS—RIGHTS OF PARTIES DEFRAUDED. The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reasonable time to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim damages for the injury sustained by reason of the fraud.

RESCISSION OF CONTRACT OF SALE WHEN VENDOR RETAINS POSSESSION OF PROPERTY—NOTICE OF RESCISSION. Where a person desires to rescind a contract of sale of property on account of fraud, if the vendor has retained possession of the property sold as security or otherwise, the purchaser should indicate his intention to rescind and notify the seller that he abandons all right or claim to the property; and if he fails to do so, he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it.

Appeal from the District Court of the Twenty-third Judicial District, City and County of San Francisco.

James C. Cary, for appellant.

James B. Townsend, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The action was brought upon a promissory note given by defendant on the seventeenth day of April, 1872, in part consideration for certain stock of Homestead Associations, and the defense is that defendant was induced to purchase the stock by false representations of plaintiff, that the lands of the Homestead were unincumbered, while in fact they were largely incumbered.

Plaintiff having proven his complaint *prima facie*, defendant submitted his case upon the stipulation following: "For the purposes of this action, it is hereby admitted that the

facts stated in the first defense of defendant's answer filed herein are true."

The defendant, among other matters, avers in the first count of his answer: "This defendant has since said seventeenth day of April, 1872, and prior to the discovery herein-after mentioned, paid to said Collins in installments upon the said promissory note, the sum of sixteen hundred dollars in United States gold coin. That shortly after the payment of the last of the said installments above mentioned the defendant discovered"—the representations of plaintiff to be false.

The pleading being taken more strongly against the pleader, it must be presumed that the discovery of the fraud was immediate after the first of January, 1873—the date when the eighth installment would become due.

The complaint herein was filed February 4, 1876; the answer May 22, 1876.

The stock purchased by defendant was pledged to plaintiff as security for the payment of the note sued upon. Under the contract of pledge the stock was sold on the thirteenth of November, 1874, for the sum of \$19.60 and the proceeds applied upon the note.

In *Gifford vs. Carvill*, 29 Cal. 592, it was said by the Supreme Court of California: "Appellant insists that, although the matters alleged and claimed to have been proved, might, if true, have justified the defendant in rescinding the contract and returning the stock, yet, until such rescinding and return, they constituted no defense to an action on the note; and such is the general rule upon the subject. In *Herrin vs. Libby*, 36 Maine, 357, the rule is expressed in the following language, namely: 'The right of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reasonable time to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud.' In *Burton vs. Stewart*, 3 Wend. 230, the Court say: 'Had they intended to treat the contract as void, on the ground of fraud, it was their duty, when they discovered that the mare was not such as the plaintiff had represented her to be, to have restored her to the plaintiff. When prosecuted on the note and the cause brought to trial, it was too late to repudiate the contract.' See also, *Kimball vs. Cunningham*, 4 Mass. 502; *Norton vs. Young*, 3 Greenl. 32; *Campbell vs. Fleming*, 1 Adolph and Ellis, 40. These authorities state the rule correctly in all cases where the property purchased is of the slightest value to any one."

It will be observed that in the first count of the answer there are no averments of damage sustained by defendant by reason of the fraud—the defense is evidently intended as a repudiation of the contract; a claim that it is void by reason of the fraud.

From the second of January, 1873, until the thirteenth of November, 1874—a period of more than twenty-two months, during the first eight months of which eight installments, of \$200 each, became due—the defendant took no step to rescind the contract by notice to plaintiff or otherwise. While the contract continued unrescinded the plaintiff could sell the stock and apply the proceeds to the note only in case the \$3,000 was not paid at the end of fifteen months, from the first of June, 1873—when the last installment became due. Defendant did not have manual possession of the stock; plaintiff had that. But a return of the property is only one mode of putting the parties in *statu quo*. If the vendor had retained possession of the property sold, as security or otherwise, the purchaser may indicate his intention to rescind and notify the seller that he abandons all right or claim to the property. If he fails to do this under such circumstances he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it.

As we have seen, the person desiring to rescind a contract because of fraud must restore—so far as his action can do this—the parties to their former condition within a reasonable time.

Here the evidence fails to show that the contract was rescinded. It may be that after the stock was sold by the pledgee, nothing would be accomplished by going through the form of offering to return that of which defendant never had the actual possession; but if the defendant intended to rescind his contract he should have made his purpose known within a reasonable time after the discovery of the alleged fraud. Here there was no disavowal of the contract until at least the complaint was filed, more than three years after such discovery. The Court below should have held, that defendant had not sought to rescind within a reasonable time.

After setting forth the facts on which he relies in the first count of the answer, the defendant alleges: "And said defendant says that said note was obtained from him, this defendant, by the said Plaw and Collins, by and through the fraud and false and fraudulent representations, statements and assurances aforesaid, and without consideration therefor, and that no money whatever was ever, or is now, justly or at

all due from this defendant to said plaintiff thereon, or on account thereof."

There is nothing in the suggestion that the words "and without consideration therefor" constitute a separate and independent allegation of fact, the admission of which, by the stipulation hereinbefore recited, authorized the Court below to render a judgment for defendant. The evident meaning of the pleader was "without consideration," because of the false and fraudulent representations, statements and assurances aforesaid."

Judgment reversed and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed February 28, 1881.]

No. 6854.

MARY E. MAYNARD, EXECUTRIX, ETC., RESPONDENT,
VS.

FREDERICK MCCRELLISH, APPELLANT.

AFFIDAVIT OF SERVICE OF SUMMONS MUST SHOW THAT PERSON SERVING IT WAS OVER EIGHTEEN YEARS OF AGE AT TIME OF SERVICE. Where a summons was served by a private person on April 15, 1879, and the affidavit of such service, made on April 16, 1879, stated that the person serving it "is over the age of eighteen years," without stating that he was over eighteen at the time of service: *Held*, that such affidavit was insufficient, and that a judgment by default, based thereon, was invalid.

Appeal from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

E. W. McGraw, for appellant.

Francis Johnson, for respondent.

By the COURT:

This is an appeal from a judgment entered upon default.

Proof of service of summons made by affidavit. The affidavit was made April 16, 1879, and in it the affiant states that "he is over the age of eighteen years," and that the service was made April 15, 1879. According to Section 410, C. C. P., the service must be made by a person (if other than the Sheriff) who, at the time of service, was over eighteen years of age. It does not appear from the affidavit that at the time of service—namely, April 15, 1879—the person making the service was over eighteen years of age.

Judgment reversed.

DEPARTMENT No. 2.

[Filed February 28, 1881.]

No. 6382.

JOHN BENSLEY AND FREDERICK MASON, RESPONDENTS,
VS.

STEPHEN A. WHIPPLE ET AL., APPELLANTS.

NEW TRIAL ORDER SELDOM DISTURBED FOR INSUFFICIENCY OF EVIDENCE. An order denying a motion for a new trial may be reversed on the ground that the evidence is insufficient to justify the verdict; but it can seldom happen that there will be such an entire absence of evidence to support it as will justify a reversal.

JUDGMENT NOT DISTURBED WHERE APPEAL HINGES UPON QUESTION OF MERIT OR PREPONDERANCE OF EVIDENCE. If on appeal from a judgment based upon the verdict of a jury, it appears that the case hinges merely upon the preponderance of evidence, the judgment will not be disturbed.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

G. F. & W. H. Sharp, for appellants.

McAllister & Bergin, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

Appellants' counsel endeavors in his brief and oral argument to prove that the evidence is insufficient to justify the verdict. An order denying a motion for a new trial may be reversed on that ground, but it can seldom happen that there will be such an entire absence of evidence to support a verdict as will justify this Court in disturbing it, particularly after the Court which tried the case has declined to do so. The reason why this Court will not interfere with an order granting or denying a motion for a new trial on the ground, where the evidence is conflicting, without any regard to its apparent preponderance, has been too often stated to render a repetition of it necessary. And it is sufficient upon this point to remark that there is some evidence upon each of the material issues involved in this case to support the verdict.

After examining the rulings of the Court which were excepted to on the trial, and are now specified as errors of law, we are unable to discover any error in any of them for which the judgment should be reversed.

The charge of the Court was not excepted to, and the instruction asked by the appellant was substantially given.

The instructions given at the request of the respondents, and excepted to by appellants, were correct, if there was any evidence upon which the plaintiffs were entitled to recover.

If there had been none, as appellants' counsel contends, the instructions would doubtless be erroneous. It is quite evident, we think, that the case hinges upon the preponderance of evidence, and that was a question for the determination of the jury.

Judgment and order denying a new trial affirmed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 2.

[Filed February 28, 1881.]

No. 6827.

WOLFF APPEL, RESPONDENT,

VS.

HIS CREDITORS, RESPONDENTS,

M. FRIEDLANDER, ASSIGNEE, APPELLANT.

MONEY PAID BY SHERIFF TO ASSIGNEE IN INSOLVENCY MUST BE RETURNED IF INSOLVENT DENIED BENEFIT OF INSOLVENT LAW. Where in insolvency proceedings the assignee received certain moneys, which had belonged to the insolvent, from the Sheriff; and, after a trial which resulted in the insolvent being denied the benefit of the insolvent law, an order was made requiring the assignee to return the money to the Sheriff: *Held*, in the absence of a showing of any further facts, that the order was correct.

Appeal from the County Court of the City and County of San Francisco.

Martin S. Meyer, for appellant.

Naphtaly, Friedenreich & Ackerman, and *H. H. Lowenthal*, for respondents.

By the Court:

Appel petitioned for the benefit of the insolvent law, and M. Friedlander was appointed assignee. The assignee received from the Sheriff of the City and County of San Francisco certain moneys belonging to Appel. After a trial of issues presented, Appel was denied the benefit of the insolvent law. Thereupon the Court made an order that the assignee return the moneys to the Sheriff. The assignee appealed from the order.

There is nothing in the record showing that the Court erred in making this order, which we must hold correct until the contrary is shown.

Order affirmed.

DEPARTMENT No. 1.

[Filed March 5, 1881.]

No. 6570.

JOHN G. AYRES, RESPONDENT,

VS.

J. BRUCE PALMER ET AL., APPELLANTS.

HOLDER OF LEGAL TITLE TO REAL PROPERTY ALLOWING IT TO BE MORTGAGED BY OTHERS—ESTOPPEL. Where A, being in possession of and claiming a tract of land as a Spanish grant, conveyed it for a nominal consideration to B, his father-in-law, living in Rhode Island; and B, after the grant was rejected, acquired title by purchase from the United States under the Act of Congress of March 3, 1865, but continued to reside in Rhode Island, while A continued to reside on the land with his family, without paying rent and to improve it at his own expense; and just before acquiring his patent B appointed C, a son of A, his attorney in fact, with power to sell or mortgage the land; and there being a doubt whether C could execute a note as well as a mortgage under the power, he executed a deed to a fourth person, who executed a note and mortgage of the land, and then conveyed to B, the father-in-law, who acquiesced in the transaction; and afterwards, upon the note and mortgage falling due, and A and his family having use for other moneys, C as attorney in fact of B, under the original power, executed a second deed of conveyance of the land to D, another son of A, who thereupon executed a note and mortgage to E in consideration of moneys advanced by him to pay off the former note and mortgage, and to furnish A and his family the money required by them, of all of which B was cognizant soon after the transaction and made no objection; and in an action by E to foreclose the latter mortgage, it was objected—1st, that the power of attorney gave C no power to convey the land without consideration, and for the mere purpose of enabling the grantee to mortgage; 2d, that the power of attorney being executed before B acquired title, gave no power to convey the title which he afterwards acquired by patent; and 3d, that B could not ratify or validly acquiesce in the transaction purporting to have been done under the power of attorney, except by deed or writing: *Held*, that in equity none of the objections was valid, and that the judgment of the Court below foreclosing the mortgage should be affirmed.

EQUITABLE ESTOPPEL IN PAIS—In equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.

Appeal from the District Court of the Third Judicial District, Alameda County.

A. M. Crane, for appellants.

John M. Burnett and *Charles Clark*, for respondent.

Ross, J., delivered the opinion of the Court:

This action was brought by John G. Ayres, plaintiff, against J. Bruce Palmer, J. C. Palmer, Martha L. Palmer and Edward Field, defendants, to foreclose a mortgage made

to secure the payment of a promissory note for \$23,000, with interest, etc.

J. Bruce Palmer is the son of J. C. Palmer; J. C. Palmer and Martha L. Palmer are husband and wife, and Edward Field is the father of Mrs. Palmer.

It appears from the record that in 1857 J. C. Palmer was the claimant of a tract of land situated in Alameda County, called the ex-Mission of San Jose, and on the twenty-second of June of that year, for a nominal consideration conveyed by deed all of his interest therein to his father-in-law, the defendant Field; that the claim of title to the land was finally rejected by the United States tribunals, but by an Act of Congress, passed March 3, 1865, persons in possession of any portion of the land were permitted to purchase the same from the Government at the rate of one dollar and a quarter per acre. The defendant Field, as a beneficiary under this Act, applied to purchase a portion of the land, including the mortgaged premises. His application was granted, and on April 11, 1868, a patent therefor was issued to him. Field never lived in person on the land. He resided in Providence, Rhode Island, but occasionally visited the family of his son-in-law, Mr. Palmer, in California. The land itself was always in the possession of Palmer and family. They occupied it without payment of rent, and improved it at their own expense. In December, 1867, Field appointed Edward F. Palmer, another son of J. C. and Martha L. Palmer, his attorney in fact, to "sell and dispose of any and all lands and real property which I (Field) may own or have any interest in, situated in any portion of said State of California, to such person or persons for such price and on such terms as to the payments for the same as to him may seem meet, and upon such sale or sales to make, execute and deliver to the purchaser or purchasers, sufficient deed or deeds to convey the same, with such covenants therein as he may see fit; to mortgage any of said land in said State of California, in which I may be interested, for any purpose, on any terms, or for any sum or sums he may see fit, and upon such rates of interest as in his discretion he may see proper, and with such covenants and agreements in such mortgage as to him may seem fit * * * giving and hereby granting unto my said attorney full power and authority in and about the premises * * * with full power to make and institute for the purposes aforesaid, one or more attorneys under my said attorney, and the same again at pleasure to revoke, and generally to say, do, act, transact, determine, accomplish and promote all matters and things whatsoever relating to

the premises, as fully, amply and effectually, to all intents and purposes, as I, the said constituent, if present, ought or might personally do, although the matter should require more special authority than is herein comprised."

As will be observed, nothing was expressly said in the power of attorney as to the execution of a promissory note or other evidence of indebtedness, and a doubt seems to have arisen in the minds of the Palmers as to the authority of the donee of the power to execute a promissory note in connection with a mortgage. This doubt was solved by an understanding among themselves that the donee should convey the land to some third person, who should make the desired note and mortgage, and immediately thereafter reconvey the land to Field. Pursuant to this plan, mortgages were made from time to time upon the land for the benefit of the Palmers, one of which was made by and through E. L. Beard to the Odd Fellows' Bank of San Francisco, to secure a debt of J. C. Palmer. Whatever was done in the way of mortgaging the property under this arrangement was made known to Field by his attorney in fact, and by other members of the Palmer family. Field made no objection to the course pursued by his attorney in fact, but acquiesced in it.

The debt contracted in the name of Beard to the Odd Fellows' Bank becoming due, the bank threatened to foreclose the mortgage given to secure its payment. At the same time some stock transactions, which J. C. Palmer had been carrying on in the name of his son Edward F. Palmer, were pressing him, and the son Edward himself was laboring under financial embarrassments. Under these circumstances the plaintiff in this action, at the request of the Palmers, agreed to pay off the mortgage debt for them to the Odd Fellows' Bank, and to discharge the stock debts of J. C. and Edward F. Palmer, and did do so—in consideration of which Edward F. Palmer, as the attorney in fact of Field, executed a deed for the mortgaged premises to J. Bruce Palmer, and the latter thereupon executed to the plaintiff the note and mortgage in suit, and then reconveyed the premises to Field. The transaction was made known by the agent to Field, who made no objection thereto. Field soon after came out on a visit to his daughter, and before leaving California conveyed the land by deed of gift to her, and thereupon took from her and her husband a mortgage thereon to secure payment of \$17,434, due from them to him. The deed and mortgage last mentioned were executed May 8, 1877.

Field and the Palmers now seek to repudiate the transac-

tion with the plaintiff, and claim, in the first place, that the deed to J. Bruce Palmer conveyed to him no interest in the land, and that therefore he mortgaged nothing to the plaintiff; secondly, that in no event did the power of attorney authorize Edward F. Palmer to convey or mortgage the title acquired by Field by the United States patent; and, thirdly, that there could be no such thing as a ratification of the transaction by Field except by deed or writing.

We will briefly notice these points in the order stated:

The argument upon which it is sought to sustain the position first assumed by the appellants is, that the power of attorney from Field to Edward F. Palmer did not authorize the latter to convey the land without consideration, and that as J. Bruce Palmer paid nothing for the conveyance to him, he got no title by the deed, and therefore mortgaged none to the plaintiff. To adopt this view we should have to stick in the dark and close our eyes to the real transaction. This can hardly be expected of a Court of equity. The making of the deed to J. Bruce Palmer was a part of the mode adopted by the Palmers and the plaintiff for the execution of the mortgage—the consideration for which was the payment by the plaintiff of the Palmer debt to the Odd Fellows' Bank, thus discharging the bank's mortgage on the property, and the cancellation of J. C. and Edward F. Palmer's indebtedness to the plaintiff, amounting in the aggregate to the sum of \$23,000. This was sufficient consideration to support the transaction.

The power of attorney from Field to Edward F. Palmer was executed in December, 1867. At that time the legal title to the mortgaged property was in the Government of the United States. But Field, by virtue of the Palmers' possession of the land, and of the deed from J. C. Palmer, had filed an application to purchase it from the Government under the Act of Congress to which reference has been made, and thus expected to obtain the legal title, and did so by the patent issued April 11, 1868. The power of attorney must be read in the light of these facts, and also in the light of the further facts that from first to last the Palmers remained in possession of the land without payment of rent, improved it at their own expense, and mortgaged it repeatedly for the benefit of the family, in precisely the same manner as was adopted in the present case; and all this with the knowledge of Field, and without objection on his part. Indeed, J. C. Palmer himself testified that the "land was in the family, and considered in the family all along." Again: "This mortgage to the Odd Fellows' Bank entered into and formed a part of the \$23,000. Mr. Ayres took it up and paid the

full face of it. He paid it at the request of us generally—among us a family matter—to save it from foreclosure.”

The language of the power of attorney was broad enough to authorize the attorney-in-fact to mortgage the title conveyed by the patent; and in view of the facts as testified to by the Palmers themselves, there can be no doubt that such was the intention of Field at the time of its execution. That by virtue of the power of attorney, Edward F. Palmer *did* mortgage this title, through Beard, to the Odd Fellows' Bank, for the benefit of the Palmer family, clearly appears, and that the fact was made known to Field and assented to by him is equally apparent. It was this very debt, thus created and thus sanctioned, that formed in part the consideration for the mortgage to the plaintiff. Concerning the latter, Edward F. Palmer testified: “He (Field) was informed afterwards about this. I do not remember and cannot tell how long after. Mr. Field was out here afterwards. I cannot say that he objected to it. I do not know whether he ever objected to it. He never objected to it to me. The manner of doing it was suggested by previous mortgages which I had executed in the same way. * * * I have generally informed him on all business matters that I have transacted. I cannot answer any more fully than that. I do not think that I wrote to him immediately about the mortgage to Mr. Ayres. I do not know. He came out here soon after that. It is probable he knew all about it, because when he arrived here he spent his visit with us. He visited one daughter and then came down and stopped at our house. * * * He greeted me very cordially. * * * I do not remember whether I had written him about this mortgage before he came out. I expect he was notified. He made no complaint to me when he came out about it.”

It is worthy of remark that Mr. Field was not examined as a witness on the trial of this case, nor was his deposition taken. We are entirely satisfied from the evidence in the case that he was fully informed of all that was done by the Palmer family, for whose benefit he seems to have held the title to the land, and never objected to the course pursued with respect to it, but allowed them to deal with the property as they saw proper, under his power of attorney to Edward F. Palmer. As was well said by the Court below, “He has been silent all along, when it was his duty to speak. And in equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.”

Judgment and order affirmed.

We concur: McKee, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed January 6, 1881.]

No. 7234.

ELVIRA MORGAN, RESPONDENT.

vs.

J. M. MILLER ET AL., APPELLANTS.

SALE OF CATTLE—DELIVERY AND CHANGE OF POSSESSION AT CORRAL. Where A having cattle, which ran at large with those of B, his tenant, in a pasture used by them both, made a sale to C, and in consummating it directed B to drive them up into a corral, where A, B and C met; and A said to C, "Here are your cows that you bought," and C then requested B to take care of and pasture them for her, and thereupon B, agreeing to do so, turned them back into the pasture: *Held*, that the delivery and change of possession were sufficient to protect the cattle from being afterwards seized as the property of A.

Appeal from the District Court of the First Judicial District, Ventura County.

The cattle referred to in the opinion, and for the conversion of which this action was brought, were, at the time of the sale by Higgins to the plaintiff, running in a pasture used in common by Higgins and Dunn, his lessee. Both had stock in the pasture. Dunn had charge of his own stock. At the time of the sale Dunn, at Higgins' request, drove Higgins' cattle into a corral, where plaintiff, Higgins and Dunn met. Higgins then said to the plaintiff, "Here are your cows that you bought," whereupon plaintiff requested Dunn to take care of them for her, and wanted them to run in the pasture. They were then turned back into the pasture, and continued to run there until seized by the Sheriff as the property of Higgins. On this state of facts, defendants claimed that plaintiff did not have the actual, open and unequivocal possession of the cattle necessary to protect them against creditors of Higgins.

Bledsoe & Pettinos, for appellant.

Williams & Williams, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover damages for an unlawful conversion of plaintiff's cattle. On the trial the jury returned a verdict for plaintiff. Defendants moved for a new trial, which was denied, and they appealed from the judgment and the order denying a new trial. Appellants urge that they are entitled to a new trial on the ground that the verdict is not sustained by the evidence.

It appears from the testimony that the plaintiff purchased the cattle sued for from one Higgins. The defendant Miller was Sheriff of the County of Ventura, and, as such Sheriff, levied upon the cattle in controversy by virtue of a writ of execution issued upon a judgment recovered against Higgins by Daly and Rogers, in the District Court for Ventura County. It is contended on behalf of appellants that the evidence shows that the sale to the plaintiff was void as to Daly and Rogers, for the reason that it was not accompanied by an immediate delivery and followed by an actual and continued change of possession—that, therefore, the verdict is not sustained by the evidence, and it should be set aside and a new trial granted. We have examined the testimony, and are of opinion that it sustains the verdict, and that there was no error in the ruling of the Court below.

Judgment and order affirmed.

We concur: Sharpstein, J., Myrick, J.

IN BANK.

[Filed February 24, 1881.]

No. 10,595.

THE PEOPLE, RESPONDENT,

VS.

WILLIAM CLARKE, APPELLANT.

CRIMINAL LAW—TRANSCRIPT SHOWING DEMURRER FILED TO INFORMATION, BUT FAILING TO SHOW ACTION THEREON. Where the record on appeal from a judgment of conviction in a criminal case showed that a demurrer for insufficiency had been filed to the information, but did not show what action had been taken respecting it: *Held*, that for aught that appeared such demurrer may have been withdrawn by the defendant himself, and, the information appearing to be good in substance, that the judgment should be affirmed.

Appeal from the Superior Court of Monterey County.

Charles W. Quilty, for appellant.

A. L. Hart, Attorney-General, for respondent.

By the COURT:

This appeal is taken from the judgment alone. The ground of the appeal is the alleged insufficiency of the information. This objection is permitted by the statute to be taken advantage of in three ways, and in three ways only—that is to say: 1. By demurrer; 2, at the trial, under the plea of not guilty; and 3, after trial, in arrest of judgment. (Penal Code, Section 1004 and 1012.) In the present case

the defendant did not attempt to avail himself of but one of the modes allowed by the statute. He filed a demurrer, but what action was taken in the Court below respecting it the record does not inform us. There is no order overruling it, and for aught that appears it may have been withdrawn by the defendant himself. We have, nevertheless, examined the information, and find it good in substance.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed February 18, 1881.]

No. 6693.

JAMES S. McCUE, APPELLANT,
vs.

A. W. VON SCHMIDT ET AL., RESPONDENTS.

DUPONT VS. BARSTOW, 45 CAL. 446, AFFIRMED. Where a case presented the same question as to the effect of an outside land deed in the City and County of San Francisco, as that involved in *Dupont vs. Barstow*, 45 Cal. 446: Held, that a judgment in favor of the deed holder should, on the authority of that case, be affirmed.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action to have the defendants declared to hold the legal title of certain portions of the outside lands of San Francisco as trustees for the plaintiff. The defendants appear to have proceeded regularly under the outside Land Ordinance of the City and County of San Francisco, and after making their proofs acquired their deeds from the City and County to the property in controversy. Plaintiff claimed that the testimony upon which defendants so acquired their deeds was false, and that he, and he alone, was in possession of the premises as required by the Ordinance, and that he, and he alone, was entitled to a conveyance. The defendants demurred, and their demurrer being sustained, and plaintiff declining to amend his complaint, there was a judgment for defendants.

George W. Tyler, for appellant.

Wm. Hayes and George R. B. Hayes, for respondents.

By the COURT:

The question involved in the case was passed on by the Court in the case of *Dupont vs. Barstow*, 45 Cal. 446, and upon the authority of that case the judgment is affirmed.

[The following case was by oversight inserted in the last number of the Journal (page 146) without a syllabus, names of counsel, or any editorial supervision.]

DEPARTMENT No. 2.

[Filed October 25, 1880.]

No. 6843.

GEORGE E. GRANT ET AL., RESPONDENTS,
vs.

H. G. WHITE ET AL., APPELLANTS.

CONCLUSIVENESS OF NOTARY'S CERTIFICATE OF ACKNOWLEDGMENT. A notary's certificate of acknowledgment of an instrument is conclusive if the facts required are stated therein, unless it affirmatively appear that there was fraud, duress or imposition connected with the acknowledgment, and that the grantee or mortgagee had notice of such fraud, duress or imposition.

Appeal from the District Court of the First Judicial District, San Luis Obispo County.

This was an action against H. G. White and Sarah L. White, his wife, to foreclose a mortgage executed by them and acknowledged in the usual form, on certain property in the city of San Luis Obispo. An attorney, Mr. Venable appeared for them, who after filing a demurrer withdrew the same and consented to judgment in favor of plaintiffs. Subsequently Mrs. White moved to vacate the judgment and be allowed to come in and defend on the ground principally that when she acknowledged the mortgage the notary did not make her acquainted with its contents, or examine her separate and apart from her husband, and that the statement in the certificate of acknowledgment to the contrary were untrue. The motion being denied, Mrs. White took this appeal from the order denying her motion and also from the judgment.

J. L. Crittenden, for appellant.

P. A. Forrester and W. J. & Wm. Graves, for respondents.

By the COURT:

We are of opinion that no ground appears for setting aside the default of the defendant, Sarah L. White. It does not appear but that Mr. Venable was authorized to represent her. We do not see that fraud or imposition was practiced upon her at the time of the execution of the mortgage, and we are of opinion that there was nothing improper in the professional conduct of Mr. Venable. We think the rule regarding the execution of instruments by married women is correctly stated by Mr. Jones in his work on Mortgages Section 538.

Judgment and order affirmed.

Pacific Coast Law Journal.

VOL. VII.

MARCH 26, 1881.

No. 5.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 5, 1881.]

No. 6630.

HERMAN GREENBAUM ET AL., RESPONDENTS,

VS.

M. H. TURRILL, APPELLANT.

A VERIFIED ANSWER TO A VERIFIED COMPLAINT ON A PROMISSORY NOTE, SETTING UP WANT OF CONSIDERATION, ETC., CANNOT BE STRICKEN OUT AS SHAM AND IRRELEVANT. Where in an action by an indorsee on a promissory note, the defendant by a verified answer to the verified complaint, denies that there was any consideration for the note, and also denied that the payee indorsed it to plaintiff or any other person for value, and also denied that plaintiff ever paid anything for it; and such answer was on motion stricken out as sham and irrelevant: *Held, error.*

PARTY SETTING UP GOOD DEFENSE, IF TRUE, BY VERIFIED ANSWER, ENTITLED TO TRIAL ON COMMON LAW EVIDENCE. If defendant in answer to a verified complaint sets up matter which, if true, would constitute a good defense, and swears that he believes it true, he is entitled to have the issue thus made by him tried by jury upon common law evidence; and such answer cannot be stricken out as sham on mere motion upon affidavits.

ONLY UNVERIFIED AFFIRMATIVE DEFENSES CAN BE STRICKEN OUT AS SHAM.
It seems that no pleading other than an unverified affirmative defense can be stricken out as sham.

Appeal from the District Court of the Nineteenth Judicial District, City and County of San Francisco.

J. M. Wood, for appellant.

H. P. McKoon, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

The plaintiffs brought an action in the late District Court of the nineteenth Judicial District, on a promissory note given by the defendant to one James Morgan. The complaint avers that the note was indorsed by Morgan to the

plaintiffs before maturity, that payment thereof has been duly demanded, and that the whole amount of principal and interest remains due and unpaid. The defendant filed an answer in which he "denies that the promissory note mentioned in the complaint was made for value received; denies that he, defendant, ever received any consideration therefor from James Morgan, the payee therein named, or from any other person or persons whomsoever, either at the time of making said note, or at any other time, before or since; that he was not indebted to said Morgan at the time said note was made, in any sum whatever. And defendant upon his information and belief, denies that said James Morgan indorsed the same to plaintiffs, or to any other person, for any consideration whatever, and that plaintiffs ever paid or gave any consideration therefor to any person whomsoever."

The foregoing are all the denials contained in the answer which we are called upon to notice in this opinion. The complaint and answer were verified in due form.

The answer was filed on the 6th day of February, 1879, and on the 8th day of the same month a notice was given by the attorney for the plaintiffs to the attorney for defendant, that he would move the Court to strike out the answer, "upon the ground that it is sham and irrelevant," and that he would also at the same time ask for judgment against the defendant for the amount claimed in the complaint. In support of the motion, plaintiffs introduced several affidavits showing that the note was given for a full consideration, and showing also that the plaintiffs were holders for value. In answer to these affidavits, two affidavits were filed on behalf of the defendant. They were both made by him, the first being to the effect that he had fully and fairly stated the case and his defense to his attorney (naming him), and was advised and believed that he had a full, complete and meritorious defense to the action; and the second stating that "the verified answer interposed by him was made and filed in good faith on his part, and that he expected to prove the averments therein contained, and all of them upon the trial of the cause, to the satisfaction of the Court and jury." On the 19th day of March, 1879, it was ordered by the Court that the answer be stricken out as sham, and that judgment be entered for the plaintiffs and against the defendant, for ten thousand dollars, with interest and costs, as prayed for in the complaint. From that judgment this appeal is taken.

By Section 453, C. P. P., it is provided that "sham and irrelevant answers and irrelevant and redundant matter inserted in a pleading, may be stricken out upon such terms as the Court.

may in its discretion impose." "A sham answer is one good in form but false in fact, and not pleaded in good faith." (*Piercy vs. Sabin*, 10 Cal. 22.) Mr. Chitty, in his work on Pleading (vol. 1, p. 541), says: "Sham pleading—that is, the pleading a matter known by the party to be false, for the purpose of delay or other unworthy object—has always been considered a very culpable abuse of justice." By Section 538 of the New York Code, it is provided that "a sham answer or a sham defense may be stricken out by the Court upon motion and upon such terms as the Court deems just." In the case of the *People vs. McCumber*, 18 N. Y. 315, the Court of Appeals gave substantially the same definition of a sham answer as that given by the Court in *Piercy vs. Sabin* (*supra*).

The precise questions involved in this case have never been passed upon by the Supreme Court of this State.

It is well settled that the plea called the general issue could not be stricken out at common law as sham; neither can it be under the Code. (*Fellows vs. Muller*, 38 N. Y. 139; *Wayland vs. Tysen*, 45 N. Y. 281; *Thompson vs. Erie R. R. Co.*, Id. 468; *Fay vs. Cobb*, 51 Cal. 315.) "The defendant has the right to put the plaintiff to the proof of his demand, and to urge that he establish it by evidence admissible for that purpose. An *ex parte* affidavit is not such evidence." (*Fay vs. Cobb*, 51 Cal. 315; *Wayland vs. Tysen*, 45 N. Y. 282.)

One of the averments in the answer which was stricken out in this case was that the note was given without consideration; and such a defense could be proved under the general issue at common law. (1 Chitty on Pleading, 477.)

There is, however, another question, and a more important one, involved in this case, and that is, can a *verified answer*, such as was interposed by the defendant, be stricken out on motion. If it contained but a general denial of the facts essential to the maintenance of the plaintiff's action, it could not be stricken out at common law. The authorities referred to above establish that principle. The Code provides, however, that when the complaint is verified, the answer shall also be verified, and a specific denial of every controverted fact is required. A general denial of the averments of the complaint was therefore inadmissible in this case.

In support of the action of the Court below in striking out defendant's answer, the strongest case referred to by the learned counsel for the respondents is that of *The People vs. McCumber*, already cited. In that case Judge Strong remarks that "he knew of no better right to obstruct the

plaintiff in the enforcement of an honest demand to which there is no defense by the general issue than by a special plea." And he adds, "Whatever may have been the reason, under the old system, for limiting the exercise of the power to strike out false or sham pleas to those presenting affirmative defenses, it has no application under the new to defenses in denial of the complaint, or of material portions of it, or denying any knowledge or information thereof sufficient to form a belief. Such denials simply put in issue the allegations to which they relate, and they may be false or sham and abused for improper purposes as well as a defense of any other character." The learned Judge also says, in regard to the verification of the answer, that the Code makes no distinction, in the respect of striking out, between answers verified and unverified, and remarks that there is none in principle. "A limitation to this section (concerning sham answers) by the Courts to affirmative answers and defenses would, to a great extent, frustrate the policy referred to, and allow of great abuses in pleading, and improper and injurious delays of justice." The case of *Butterfield vs. Macumber*, 22 How. Pr. 150, and other New York cases are to the same effect.

But the more recent case of *Wayland vs. Tysen*, 45 N. Y. 281, lays down a different rule. In that case, Grover, J., delivering the opinion of Court of Appeals (which opinion was concurred in by all the Judges) says: "Under the common law system the general issue could not be struck out as sham, although shown by affidavits to be false. (*Broom Co. Bank vs. Lewis*, 18 Wend. 565.) This was not upon the ground that a false plea was not sham. That was always so regarded; but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The Court, under that system, exercised the power of striking out pleas, setting up affirmative defenses as sham, when shown by affidavits to be false, but not when the party verified such plea by affidavit. It has been claimed, and the claim somewhat sanctioned by the Supreme Court, that these rules have been changed by Section 152 of the Code. (It is now Section 538.) That by this, all distinctions in striking out answers between such as merely deny the allegations of the complaint either generally or specifically, and those setting up affirmative defenses, have been abolished. This question must be regarded as original in this Court, notwithstanding the claim that this

construction was adopted in *The People vs. McCumber*. A close examination of this case shows that this question was not involved. It is true that an opinion sustaining the construction contended for was given by Strong, J.; but the case shows that Judges Denio and Harris dissented from this opinion. * * * This case cannot, therefore, be regarded as an authority for the construction insisted upon. The section in question simply confers power upon the Court to strike out sham and irrelevant answers and defenses. This power, the Court, as we have seen, possessed and exercised under the pre-existing laws. * * * I think that by a true construction of the section the power of the Court to strike out pleadings was not extended beyond what it was under the pre-existing law. That, as we have seen, extended only to such affirmative defenses as were not verified by the oath of defendant or other equivalent evidence. It may be said that a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectually deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs. * * * If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen to prosecute those known to be guilty of perjury, they would effectually stop such an abuse. I am satisfied that the intention of the Legislature in enacting the section of the Code under consideration, was not to confer any new power upon the Court, but to give legislative sanction to that exercised under the existing law." The authority of this case was followed by the same Court in the case of *The Farmers' National Bank of Fort Edward vs. Warren Leland et al.*, 50 N. Y. 673. The following is that case:

"The action was upon a promissory note alleged to have been transferred to plaintiff for value before maturity. Defendants denied the transfer upon information and belief, and alleged, if transferred, it was after maturity; and set up as recoupment damages for breach of contract upon which the note was given.

The motion to strike out the answer was made upon affidavits showing the transfer of the note before maturity, for a valuable consideration, without notice. The order appealed from was reversed upon the authority of *Wayland vs. Tysen*, 45 N. Y. 281, and *Thompson vs. Erie R. R. Co.*, Id. 468."

The latest New York case we have been able to find on this question is that of *Roby et al. vs. Halleck*, 55 Howard Pr. R. 412, decided August Term, 1878. This was an action on a promissory note, the plaintiff suing as indorsee. The answer contained a denial of any knowledge or information sufficient to form a belief whether the note stated in the complaint was ever transferred or indorsed to plaintiffs as alleged in said complaint, or otherwise. The Court held that it had no power to strike out the answer as sham.

In the case now under consideration the answer denied that there was any consideration for the note, and also denied, on information and belief, that the payee indorsed the same to the plaintiffs or any other person for value, and also denied that plaintiffs ever paid anything for the note. Mr. Wait, in his work on Practice (vol. 2, p. 492), says: "It may well be doubted if under the construction given to Section 152 of the Code by the Court of Appeals, the Court has the power to strike out as sham any pleading other than an unverified affirmative defense." In the case of *Gostoris vs. Taaffe et al.*, 18 Cal. 385, the Court says: "If the defense be *bona fide*, the affidavit of the defendant to that effect will be a sufficient answer to any attempt to strike it out."

In our opinion the remarks of the Court of Appeals of New York in the case of *Wayland vs. Tysen*, are eminently sound and conclusive. The plaintiff moves the Court to strike out the answer, and if the motion is denied, he is simply required to pay the costs; but if his motion prevails, the effect is the same as a trial and verdict against the defendant. It is a harsh rule that operates so unequally. The defendant in this case set up matters which, if true, constituted a good defense to plaintiffs' action, and he swore that he believed them to be true. We think that he was entitled to have the issues made by him tried by a jury. If there had been a jury trial upon such issues, and a verdict rendered in defendant's favor upon his uncontradicted evidence, this Court would not disturb the verdict.

We are of the opinion the Court below erred in striking out as sham the verified answer of the defendant, and the judgment must therefore be reversed. So ordered.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed February 21, 1881.]

No. 6777.

THE SEATTLE COAL AND TRANSPORTATION COMPANY ET AL., APPELLANTS,

VS.

F. E. THOMAS ET AL., RESPONDENTS.

POWER OF STATE TO PASS INSOLVENT ACT WHILE U. S. BANKRUPT LAW IN FORCE.
It was competent for the Legislature to pass an Insolvent Act in 1876, while the United States bankrupt law was in force; but the operation of such Act was suspended until the repeal of the Federal law.

VERIFICATION—TRUE OF ONE'S OWN KNOWLEDGE AND BELIEF—WORDS "AND BELIEF" SURPLUSAGE. A verification to a petition to the effect that affiant has read the same and knows its contents, "and that the same is true of his own knowledge and belief," is not defective on account of the words "and belief," for the reason that they do not add to or take away from the force of the preceding words, and may be rejected as surplusage.

OBJECTION TO VERIFICATION OF PLEADING NOT COGNIZABLE ON DEMURRER.
An objection to the sufficiency of the verification to a pleading cannot be heard on demurrer.

Appeal from the County Court of Alameda County.

Vrooman & Davis, and Mastick, Belcher & Mastick, for appellants.

J. G. McCallum and J. B. Harmon, for respondents.

MYRICK, J., delivered the opinion of the Court:

1. The insolvent law of this State, supplementary to the Act of May 4, 1852, was passed March 31, 1876. At the time the Federal Bankrupt law was in force, and remained so until 1878. It is claimed by the respondent that during the existence of the Federal law the State had no power to pass any law upon the subject, so far as the same was covered by the Federal law. This point was directly passed upon by this Department, in *Lewis vs. County Court of Santa Clara County*, opinion filed September 3, 1880, where we held that it was competent for the Legislature to pass the insolvent law, but that its operation was suspended until the repeal of the Federal law.

2. The verifications to the petitions are sufficient, as well in form as in substance. Each party verifying states "that he has read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge and belief." The respondent urges that the verifica-

tions are defective by reason of the words "and belief." Those words may be treated as surplusage; they neither add to nor take from the force of the words preceding, viz.: "That the same is true of his own knowledge." Besides, the objection to the verification, even if defective, cannot be heard on demurrer.

3. The allegations in the petition as to the debts being due are sufficient, even omitting the promissory note for \$6,000.

Judgment and orders reversed and cause remanded, with instructions to overrule the demurrers, and that the respondents have leave to answer within ten days after notice of the overruling of the demurrers.

We concur: Morrison, C. J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed March 10, 1881.]

No. 6822.

ELIZA A. BYRNE, APPELLANT,

vs.

JAMES H. BYRNE, RESPONDENT.

ORDER CHANGING PLACE OF TRIAL, WITHOUT "DEMAND IN WRITING" THEREFOR, ERRONEOUS. Where a defendant moved to change the place of trial of an action on the ground that the county was not the proper one for the trial thereof and filed affidavits, but omitted to file a demand in writing as prescribed by Section 396 of the Code of Civil Procedure: *Held*, that an order changing the place of trial was erroneous and should be reversed.

Appeal from the District Court of the Nineteenth Judicial District, City and County of San Francisco.

George Turner, for appellant.

Long & Burnett, for respondent.

By the COURT:

This is an appeal from an order changing the place of trial. The motion was based upon affidavits, but no demand in writing was filed. The notice of the motion was not a demand. (See Section 396 C. C. P.; *Estrada vs. Orena*, 54 Cal. 407.)

Order reversed.

DEPARTMENT No. 2.

[Filed March 15, 1881.]

No. 6625.

LIAM HUNTER ET AL., RESPONDENTS,

VS.

MARTIN AND C. H. GORRILL, APPELLANTS.

ETHER CONTRACTING NEED NOT BE PARTNERS TO SUSTAIN
 IT AGAINST THEM—WHEN FINDING OF PARTNERSHIP NOT

In an action against two persons to recover damages for
 purchase certain bricks alleged to have been agreed to be
 by them from plaintiff, where the complaint averred that
 partners and doing business under a certain firm name; and
 denied that they "ever were or now are partners" without
 at they were doing business under the firm name; and it
 that they together agreed to purchase the bricks: *Held*, that
 liability under their agreement did not depend upon their
 ers, and that the denial that they "ever were or now are
 did not raise a material issue upon which it was necessary
 rt to find.

EMENT AS BASIS FOR EXCEPTION. Where a transcript
 on the course of a trial for damages for failure to purchase
 ks, alleged to have been agreed to be purchased by defendants
 ffs, the plaintiffs' counsel stated that "all they want to
 t they were rejected, which was sustained by the Court,
 d to by the defendants:" *Held*, that there was no basis for
 n.

in the District Court of the Twelfth Judicial
 and County of San Francisco.

lson, for appellants.

rrison, for respondents.

J., delivered the opinion of the Court:

'that the defendants ever were or are now
 not raise a material issue upon which it was
 he Court to find. It is not denied that they were
 ss under the firm name of Martin & Gorrill,"

that they agreed with the plaintiffs to pur-
 m 25,000 bricks at the price of twelve dollars

If they entered into that agreement, their
 ot depend upon their being partners.

progress of the trial plaintiffs' counsel remarked
 he defendants wanted to prove was that the
 ejected, which was sustained by the Court and
 the defendants. We are unable to discover
 is for an exception.

respond to all the material issues, and are
 he evidence, although it is conflicting upon
 ntroverted points.

nd order denying a new trial affirmed.

Morrison, C. J., Myrick, J.

U. S. Circuit Court—District of Oregon.

[Filed January 17, 1881.]

No. 591.

D. CAHN

vs.

ELISHA BARNES.

PATENT—CONTRADICTION OF BY ORAL EVIDENCE. On March 12, 1860 (13 Stat. 3), Congress granted the swamp and overflowed lands in Oregon to the State to be identified and patented by the Secretary of the Interior; on July 5, 1866 (14 Stat. 89), Congress granted to the State, to aid in the construction of a wagon road from Albany to the eastern line thereof three sections per mile of the public lands to be selected within six miles of said road, as the same might be located, and on June 18, 1874 (18 Stat. 18), authorized patents to issue therefor as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon road grant to the State of its assigns for the premises in controversy: *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon road grant, and were therefore not swamp land—the latter conclusion being a necessary element of the former.

ESTOPPEL. In 1871 the premises in controversy were selected and approved by the Land Department as a part of the wagon road grant, without objection on the part of the State or any attempt to show that they were swamp, and in 1872 the State sold the same to the defendant as a swamp, and the defendant is in possession without having paid the purchase money: *Held*, that the defendant has no title, and cannot prove title in the State under the swamp land grant, because the State is estopped to deny that the premises are within the wagon road grant.

Action to recover possession of real property.

E. C. Bronaugh, John W. Whalley and M. W. Fehheimer for the plaintiff.

W. Lair Hill, for the defendant.

DEADY, J.:

This action is brought by a citizen of California against a citizen of Oregon, to recover the possession of section 3 of township 15 south, of range 16 east of the Wallamee meridian.

The plaintiff claims to be the owner of the premises and entitled to the possession thereof as the successor in interest of the State of Oregon.

nt only defends for the northeast one-fourth and pleads title thereto in the State of Oregon mp Land Act of March 12, 1860 (12 Stat. 3), in possession under the State, in pursuance of ontract of purchase therefrom, under the Act 1870 (Ses. L. 54), providing for the selection d swamp lands.

denies that the premises are swamp land in s that the Secretary of the Interior has decided also that the State, by accepting a patent from tes of the land in controversy as wagon road ed now to assert that the land is swamp, which the defendant, the State's vendee. s tried by the Court without the intervention

a stipulation was read containing the evidence cept as to the question of whether the premises mp land or not, and as to that, oral evidence ublic to the objection of the plaintiff for in-

the case are as follows:

1866, Congress, "to aid in the construction of gton road" from Albany, via Canyon City, ascade Mountains to the eastern boundary of ated to the State the "alternate sections of the esignated by odd numbers, three sections per ected within six miles of said road." (14 Stat.

aking the grant contains a provision that not ections of the grant "shall be disposed of"— d as fast as the Governor of the State "shall ecretary of the Interior that any ten continuous road are completed. By an Act of July 15, 1863), Congress changed the line of the road City to Camp Harney; and by the Act of June 1864 (Stat. 80), it was provided in effect, that when- ed from "the certificate of the Governor," as July 5, 1866, provided, that said road was and completed," a formal patent should issue or any corporation, being its assignee, "for as fast as the same shall, under said grant, be ertified."

of October 24, 1866 (Ses. Laws, 58), the State e grant, "for the purposes and upon the con- mitations" contained in the Act making the Vallamet Valley and Cascade Mountain Wagon

Road Company—a corporation duly organized under the laws of Oregon, in 1864.

On August 19, 1871, said corporation conveyed the premises in controversy to H. K. W. Clarke, who on September 1, 1871, duly conveyed the same to the plaintiff.

That the premises are included in a list of lands, numbered one, and described as "lands granted to the State of Oregon by the Act" of July 5, 1866, aforesaid, to aid in the construction of said military wagon road, and on May 2, 1871, the Commissioner of the General Land Office recommended said list for approval as being the lands to which the State was entitled under the grant of July 5, 1866, and therein certified "that it is shown by the certificates on file of the Governor of Oregon, bearing date April 1, 1868, September 8, 1870, and January 9, 1871, that said corporation had completed its road from Albany to the 36th section, distance 368 miles, in conformity with the provisions of said Act of Congress of July 5, 1866, and the amendatory Act of July 15, 1870;" which list was, on May 4, 1871, approved by the Secretary of the Interior, "subject to any valid interfering right which may have existed at the date of selection of said lands;" that on June 19, 1876, the United States, by its proper officers issued a patent to the State "for the use and benefit of said corporation and its assigns," purporting to grant the lands in controversy, and transmitted it to the Governor of Oregon who "received" the same "and caused it to be recorded in the counties wherein the lands therein described are situated."

The Act of October 26, 1870, *supra*, entitled "An Act providing for the selection and sale of the swamp and overflowed lands belonging to the State of Oregon," by operation of the Swamp Land Act of March 12, 1860 (12 Stat. 3), extending over Oregon, the Arkansas Swamp Land Act of September 28, 1850, provided for the selection of such lands by persons employed by the State, and the sale of the same in unlimited quantities at not less than one dollar per acre, the purchaser to pay twenty per centum of the purchase price within ninety days after the selection is completed, and the balance upon proof that the land "has been drained or otherwise made fit for cultivation." But if such final payment and proof of reclamation are not made within ten years from the time of the first payment, the land is to revert to the State; and it is declared in the Act "that all swamp land which has been successfully cultivated in either grass, the cereals or vegetables for three years, shall be considered as fully reclaimed."

ses are situate to the east of the Cascade and on the north bank of the Ochoco Creek. It went into that country from the Wallamet stock, when it was unsettled, in the fall of 1867, the place in controversy because it was good and lived thereon seven or eight years, during which it cultivated a garden of less than an acre in annually cut the wild grass from about one hundred acres of it, without, it appears, making any claim to the land under any Act of Congress until in 1872, as stated. The United States surveys were not made of the premises until October, 1869, but no title was given to the Governor by the Secretary of the Interior until some time in 1872, in which year the defendant purchased the same premises as swamp and overflowed lands, under the Act of October 26, 1870, *supra*, and on November 18, 1872, the defendant purchased the same under the Act of October 26, 1870, *supra*, and paid twenty per centum of the purchase price, but did not pay the balance on, or do anything to reclaim the land except to cut an inconsiderable ditch thereon. The commencement of this litigation; that the land, if it was swamp land, would be thereby injured and devalued; and no lists or plats of swamp lands in the State; that the premises in controversy have been made or omitted to the Governor of this State by the Secretary of the Interior.

The material question to be decided in this case is whether the patent issued to the State under the grant of the Act of 1870, for the premises in controversy is conclusive in its effect, that they belong to the wagon-road and not to the swamp land one.

The land grant was a grant in *presenti* of all the swamp and overflowed lands in the State thereby made "available for cultivation," but the determination of what lands are in this category and what do not, rests with the Secretary of the Interior, and his decision is final unless it is shown to be a fraud or mistake. (*French vs. Fyan*, 3 Otto, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

in the first instance and submit them for approval to the Secretary, and that if this is not done within the term prescribed, the grant reverts. But however that may be, the power to determine what land passes under the grant as being "wet and unfit for cultivation" still rests with the Secretary.

The statutes of the United States provide that the Secretary of the Interior is charged with the supervision—final direction—of the public business relating to the public lands, and that the Commissioner of the General Land Office shall perform under his direction all the executive duties appertaining, among other things, to "the issuing of patents for all grants of land under the authority of the Government." (Secs. 441, 453 R. S.) And by Section 2 of the Swamp Land Act it is made his especial duty to determine what lands are within its purview.

The wagon road grant was a grant in *presenti* also of the odd sections for six miles on either side of the road, wherever it might be located, between the termini named, which, so soon as the line of the road was designated, attached to such sections within the prescribed limits on either side of said line and took effect from the date thereof. (*Shulenberg vs. Harriman*, 21 Wall. 60.)

But the grant to the wagon road being subsequent in point of time to that of the swamp land, the former could not attach to any legal subdivision within the operation of the latter unless they had reverted to the United States for want of selection in due time, which could not have occurred in this case, as the surveys were not extended over the premises until 1869. And this is so, from the very nature of the case, rather than from the effect of the clause in Section 1 of the wagon road grant, excepting from its operation "all lands heretofore reserved to the United States by Act of Congress or other competent authority"—for the words, "reserved to the United States," do not describe or include lands "sold or otherwise disposed of," as did the reservation in the railway grant, cited by counsel from *Railway Co. vs. Fremont County*, 9 Wall. 94, but only Indian and military reservations and the like—lands withdrawn from the public domain for some special use of the United States, and not lands already disposed of to States or others. It is as impossible that two grants should have effect upon the same land as that two bodies should occupy the same space, and therefore the grant that is prior in point of time and has not reverted to the grantor excludes or repels the other.

In *French vs. Fyan*, *supra*, the Supreme Court held that a patent issued under the Swamp Land Act of 1850 cannot be

an action at law by showing that the land which is not in fact swamp and overflowed land.

question of admitting oral evidence to contradict this respect, Mr. Justice Miller, in delivering of the Court, after citing the case of *Johnson vs. Wall*, 72, to the effect that the action of the issuing a patent is conclusive upon the legal however, to the power of a Court of equity, in to correct or set it aside for fraud or mistake, see nothing in the case before us to take it out of that rule; and we are of the opinion that, at law, it would be a departure from sound and contrary to well-considered judgments in this of others of high authority, to permit the validity to the State to be subjected to the test of the jury on such oral testimony as might be brought would be substituting the jury of the Court jury, for the tribunal which Congress had pro- termine the question, and would be making a United States a cheap and unstable reliance as ds which it purported to convey."

Sharp vs. Stephens (August 25, 1879), this Court defendant, could not at law prove in opposi- tent under the Donation Act, that the person n as the wife of the settler, was not his wife not entitled to her half of the donation.

in allowing and issuing this patent alone that y passed upon the question to what grant the onged. In approving the lists selected under ad grant in 1871, he did the same thing; for as was not authorized, and the grant was complete proval by the Secretary of the lists of land se- it. The patent issued under the subsequent 18, 1874, *supra*, did not pass the title, but is evidence of the previously existing grant by the identity of the lands included in it. *Hanes*, 21 Wall. 529.)

e of *French vs. Fyan*, and even upon general ounsel for the defendant does not deny, but that had issued to the State for the premises under and Act, it would be conclusive in this action as cter of the land, but it is nevertheless con- he patent actually issued to the State under the grant is not such evidence that the lands are not use in the consideration and determination in partment of the question whether the premises

were within the wagon-road grant or not, the question of whether they were swamp was not necessarily involved, and therefore cannot be said to have been considered or decided.

But this reasoning is more ingenious than sound.

The effect of the decision of the Secretary does not depend on the existence of an actual or formal controversy before him, carried on by parties adversely interested therein, but upon the fact that it was duly made in the regular course of the administration or execution of the law relating to the subject.

Both the swamp land and wagon-road grant were before the department for consideration and patent.

Under the circumstances it was the duty of the Secretary, in selecting and patenting lands under the wagon-road grant, to ascertain that they were not included in the prior grant of swamp land. And whether, as a matter of fact, this was consciously and purposely done with regard to the particular land in controversy or not, in contemplation of law it certainly was. For it was impossible for the Secretary to decide, as he did, absolutely, that the land belonged to the wagon-road grant, without at the same time deciding that it did not belong to the swamp land grant.

This latter conclusion is a necessary element of the former, and therefore the law considers that before the patent to the premises was issued as and for wagon-road land, it was decided that they were not swamp. (Or. Civ. Code, § 726.)

It also appears to me that the State is estopped to say, against its grantee, this plaintiff, that this is not wagon road land. The State granted this land to plaintiff's vendor as wagon-road land, and allowed it to be selected and approved as such by the Secretary, without objection, long before it sold it to the defendant as swamp land.

The defendant has no title to this property. He is only a purchaser in possession without the purchase money being paid, and stands, therefore, in the relation of tenant to the State whose alleged title under the Swamp Land Act he sets up in bar of the action. It follows that if the State would be estopped to set up this title, or, what is equivalent thereto, to deny that the premises are wagon-road land, the defendant is also.

The State was the grantee in both these grants. It accepted the premises as part of the wagon-road grant, or allowed its grantees to do so, without objection on its part. If, however, the land is swamp in fact, the State must have neglected to furnish the department with the proper evidence thereof.

acted thus because it preferred that the land under the wagon-road grant, and thereby be of a useful public enterprise. For years after this swamp land grant was not regarded with the State, nor was it thought that there was any land to which it was properly applicable. It is the story that up to 1870 the State refused to take secure land under it, because, for one reason, it made its selections under the School Land Acts, not enough to be called swamp, as in most cases was a recommendation rather than otherwise. At the time this land was selected and approved as such, and with the acquiescence, if not the concurrence, for the benefit of its grantee, and therefore estopped to deny directly that it is included in such land, but indirectly by alleging that it is swamp land.

It was also offered in evidence by the plaintiff, ex-Governor of the State, under the great seal of the State, dated October 2, 1871, reciting the grant to the State of the land therefor to the wagon-road company, and that the road had been duly constructed and accepted, that "the lands along the line of said road to the extent of 860,000 acres, have under said donation and grant become the absolute property of said company by patent or grant from the State, but was not so because it did not purport to be a grant or conveyance by a certificate; that in the opinion of the Executive, including the premises in controversy, had been included in the wagon-road company by virtue of the executive and legislative grants and the subsequent construction of the road, and because it does not appear that the State was authorized to issue a patent for the premises under the circumstances.

The question is: (1) That the patent is conclusive evidence of the fact that the premises are not swamp, and that the oral evidence to that effect cannot be considered; that the State is estopped to deny that the premises included in the wagon-road grant, and therefore, the defendant, is also.

Secondly, the plaintiff has the legal title and is entitled to the land, and the defendant being precluded from denying that the premises are swamp, it follows, as a matter of course, that the former must recover.

It is a finding and judgment for the plaintiff ac-

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 37.

ISAAC W. LORD, PLAINTIFF IN ERROR,
VS.THE GOODALL, NELSON & PERKINS STEAMSHIP
COMPANY.

EXTENT OF LIABILITY OF OWNER OF VESSEL NAVIGATING THE OCEAN BETWEEN TWO POINTS IN THE SAME STATE FOR GOODS LOST. Where a vessel owned in California, and employed in carrying freight by the Pacific Ocean between San Francisco and San Diego, while on one of her regular trips, was totally lost with all her freight and cargo, without the privity or knowledge of her owner: *Held*, in a suit against the owner as a common carrier to recover the value of goods lost with her, that under Section 4283 of the U. S. Revised Statutes the owner's liability only extended to his interest in the vessel and freight then pending, and consequently that he was not liable.

POWER OF CONGRESS TO REGULATE OCEAN COMMERCE AND NAVIGATION BETWEEN POINTS IN THE SAME STATE. The constitutional power of Congress "to regulate commerce with foreign nations and among the several States, and with the Indian tribes," includes the power to regulate commerce and navigation on the ocean, even though it be only between points in the same State.

"COMMERCE WITH FOREIGN NATIONS" INCLUDES OCEAN COMMERCE BETWEEN POINTS IN THE SAME STATE. A vessel navigating and carrying freight on the ocean, though only between points in the same State, is, while on the ocean, engaged in commerce with foreign nations, and as such subject to the regulating power of Congress.

In error to the Circuit Court of the United States for the District of California.

Mr. Chief Justice WAITE delivered the opinion of the Court:

Sections 4283 and 4289 of the Revised Statutes are as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending."

"Sec. 4289. The provision of the seven preceding sections relating to the limitation of the liability of the owners of

not apply to the owners of any canal-boat, or to any vessel of any description what-
ever on rivers or inland navigation."

was one of the seven sections referred to in

ship Ventura, owned by the defendant in error, in navigation between San Francisco and San Diego, State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of one hundred and eighty miles on the Pacific Ocean. It was a part of a transportation line which was largely engaged in foreign and inter-state commerce, but was herself engaged only on her own route, and neither took on nor discharged cargo outside of the State of California. While on her regular voyages from San Francisco to San Diego she lost, with all her pending freight and cargo, a quantity of goods of California, without the privity or knowledge of the defendant.

This suit was brought against her owner as a party to recover the value of the goods lost. The vessel was mostly owned by retail merchants in San Diego and other places in California who had made purchases for resale from wholesale merchants in San Francisco, and shipped in transit from there. The steamship company claimed exemption from liability as owner of the vessel under Section 4283 of the Revised Statutes. On the trial the court instructed the jury "that if the jury believed that the loss occurred solely by reason of the negligence of the defendant said ship and without the privity or knowledge of the defendant said defendant, that said Section 4283 of the Revised Statutes fully exonerated the defendant from liability for the losses, notwithstanding the goods so lost were transported on a journey when lost, the final termini of which were different points in the State of California."

No exception was duly taken. The jury found in favor of the defendant, and judgment was rendered accordingly. To reverse that judgment the present writ of habeas corpus was sued out.

The question presented by the assignment of errors is whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports within the same State. It is conceded that while the defendant carried goods from place to place in California her liability was always ocean voyages.

Congress has power "to regulate commerce with foreign nations, among the several States, and with the Indian

tribes" (Const., Art. I., Sec. 8), but it has nothing to do with the purely internal commerce of the States—that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of *Gibbons vs. Ogden*, 9 Wheat. 194. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in *Gibbons vs. Ogden*, *supra*, p. 189. "Commerce with foreign nations," says Mr. Justice Daniel, for the Court, in *Veazie vs. Moore*, 14 How. 573, "must signify commerce which in some sense is necessarily connected with these nations; transactions which either immediately or at some stage of their progress must be extra-territorial."

The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the *Ventura* went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations, and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must therefore be subject to the national government.

This disposes of the case, since by Section 4289 of the

es the provisions of Section 4283 are not vessels used in rivers or inland navigation; and therefore, is relieved from the objection that the trade-mark law, which was considered in *Steffens*, 100 U. S. 82. The commerce reg- sly confined to a kind over which Congress control. There is not here, as in *Allen vs. ow*, 244, a question of admiralty jurisdiction of 1845, but of the power of Congress over f the United States. The contracts sued on the purely internal commerce of a State, but ast, connect themselves with the commerce because in their performance the laws of high seas may become involved, and the ompelled to respond.

ample authority for the Act as it now stands ial clause of the Constitution, it is unneces- r whether it is within the judicial power of tes over cases of admiralty and maritime

OCTOBER TERM, 1880.

No. 112.

UEL J. LANAHAN, APPELLANT,

VS.

SEARS AND CLARA SEARS, HIS WIFE.

EXEMPTION—FORCED DISPOSSESSION BY EJECTMENT AS ITED AS FORCED SALE BY JUDICIAL PROCESS. Where a Texas in 1873, after the Constitution of that State made t homesteads should not be subject to forced sale, etc., ed of the homestead of himself and wife, and took back stating that the deed was given to secure certain notes d, thereby constituting the transaction a mortgage; and eing aware that he could not foreclose the mortgage and roperty to sale in the State Courts, commenced an eject- . S. Circuit Court, and claimed that the deed passed to title of the property and that he had a right to recover it for default in the payment of his note: *Held*, that he as get around the State Constitution by the form of his e the Federal Court, and that a forced dispossession in eject- much within the prohibition of the Constitution as a nder judicial process.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Mr. Justice FIELD delivered the opinion of the Court:

The premises described in the complaint are in the city of Waco, in the State of Texas. They have been the homestead of the complainants from the time of their purchase, in May, 1870. The conveyance to Robertson in 1873 was accompanied by a defeasance from him, stating that the deed was executed as security for certain promissory notes of the husband. The two documents—the deed, which was absolute in form, and the defeasance—are, therefore, to be taken together as if forming one instrument. They together constitute a mortgage, and as such would be treated in the Courts of Texas.

By the Constitution of that State of 1868, which was in force when the notes were given and the mortgage executed, the homestead of a family was not subject to forced sale for debts, except for the purchase-money, or for taxes, and for labor and materials expended thereon. The premises in question, therefore, could not be sold under any decree in suit for the foreclosure of the mortgage. The prohibition of the Constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. A similar prohibition in the Constitution of 1845 was so construed by the Supreme Court of the State in *Sampson vs. Williamson*, contained in the 6th of Texas Reports. In that case Chief Justice Hemphill said that "the Constitution obviously intended that the homestead should be exempted from the operation of any species of execution or from any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their home with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property, or from any forcible appropriation of its rents, issues and profits. It protects the domestic sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts."

The appellant is the owner of the mortgage in this case and aware—so states his counsel—that he could not enforce it against the homestead in the State Courts, as there mortgages can only be enforced by a decree of sale, commence

ejectment for the premises in the Circuit Court States, contending that the mortgage passed as against the mortgagors, and that, as its a right to recover the possession of the prem- it in the payment of the notes secured. He r words, to get around the State Constitution his procedure in the Federal Court. We do its wise and beneficent purpose of securing a family against the vicissitudes of fortune, can evaded. A forced dispossession in ejectment thin the prohibition as a forced sale under s. We think, therefore, that the decree in the the action of ejectment, was properly rendered puted facts stated in the complaint; and it is rmed.

OCTOBER TERM, 1880.

No. 41.

TURBINE AND MANUFACTURING
COMPANY, APPELLANT,
VS.
JAMES E. LADD.

—PURPOSE OF LAW ALLOWING RE-ISSUE. The intent of permitting the re-issue of a patent is not to allow the enlarged, as is too generally the object of those seeking t only to allow the correction of mistakes inadvertently r the restriction of claims improperly made.
RE-INVENTION ORIGINALLY PATENTED. A re-issue of a nly be granted for the same invention which was originally attempted to be patented.

the Circuit Court of the United States for Massachusetts.

BRADLEY delivered the opinion of the Court: ts in this case filed a bill against the appellee, e latter had infringed certain letters-patent ppellants, which had been granted to Asa M. fteenth of May, 1860, for a new and improved d which had been surrendered and re-issued nth of November, 1872. The bill sought an its, damages for the infringement, and a per- on against further use of the alleged invention. filed an answer denying infringement, and as- nt of the complaints on various grounds, such

as prior discovery and invention by other persons, illegality of the new issue, etc. Proofs having been taken and the cause heard, the Circuit Court dismissed the bill, on the ground that, according to the true construction of the patent sued on, the defendant did not infringe.

It was conceded that if the re-issued patent should be construed literally, without restraining the generality of its claims by a reference to the original patent, the wheel made by the defendant would be an infringement; but the Court, in view of the state of the art at the date of Swain's invention; and of the distinct limitation of that invention to the original patent to a wheel of specific construction and form, considered itself bound to construe the claims of the re-issued patent in accordance with such limitation, in order to avoid the conclusion that it was for another and different invention from that originally patented. From a careful examination of the evidence in the case we are satisfied that this was the most favorable view that could have been taken for the complainants. A comparison of the original letters patent, including the drawings and model, with the re-issued patent, makes it very evident that the latter is the result of an effort to enlarge the scope of the patent so as to include and embrace within it matters and things that were not embraced in the original invention. The original specifications, drawings and model all agree in describing a specific wheel and associated apparatus as the subject of the invention secured by the letters patent. They distinctly describe a wheel with its floats, each made of a single piece of metal, having their face sides where the water strikes of a paraboloid form, with their bottom formed by revolving the curves about their axes, and arranged in a particular direction to receive the water from the guides; and having the rim of the wheel covering the floats so curved as to force the water down rapidly in the lowered curved parts or bottoms of the floats, the water being turned down between the curb and wheel and lower curb; they describe an annular chamber situated above and outside of the wheel, with slots in its bottom to receive and steady the guides when raised with the gate, and which is filled with water, forming a sort of stuffing box; they describe a cylindrical gate, below the annular chamber, surrounding the curb below the wheel, provided at top with a flange to which the guides are attached, and which is opened by being lowered to let the water into the wheel through the guides, and is shut by being raised up to the bottom of the annular chamber; lastly, they describe a particular contrivance for adjusting the wheel on its step, which

quence in the disposal of the present case. This is the entire description: the wheel, formed and mounted; the annular chamber; the cylindrical guides attached to its flange; and the contrivance for raising the wheel on the step. There is also a case enclosing the gate and curbs, and the machinery for lowering the gate and the wheel; but these have nothing to do with the controversy.

The patent was three-fold: First, for the wheel with slots in the bottom to receive the guides; secondly, the combined arrangement of the guides, the gate and the annular chamber as unitedly forming the wheel; thirdly, the step arrangement. Here we have a clear and distinct specification of an invention, and the subject matter of the patent. It is not claimed, either as to its form or fashion, or as to its operation. Nothing is claimed but the annular chamber, the gate and guide arrangement and the step arrangement, none of which things are in controversy in

the present case. The patent becomes a monopoly. The business is very desirable. Other manufacturers of turbine wheels approaching somewhat in the nature of that described in Swain's patent. The usual cases are resorted to. A re-issue of the patent with expanded claims sufficiently general and broad to embrace a wide monopoly of structure, and to compete with existing establishments. In this way the patent has been made the instrument of great injustice. The real object and design of a patent has been abused and subverted. The patent was not to allow a correction to be made if the patent is inoperative or invalid by reason of an insufficient description or specification, or by the patentee's claiming in his specification as his own more than he has a right to claim as new, and which has arisen by inadvertency, accident or mistake, without any fraudulent or deceptive intention." The words of the law granting the right. It was not to allow a patent to be enlarged, but to allow for mistakes inadvertently committed and the claims which had been improperly made, or made too broad—just the contrary of that to be the practice. In a clear case of misjudgment—the patent may undoubtedly

be enlarged; but that should be the exception, not the rule, whereas the enlargement of claims has become the rule, and their contraction the exception.

These remarks are well illustrated in the case before us. We have shown what was the original invention described and claimed. After the lapse of twelve years and a half the patentee (or rather his corporation assignee) discovers through inadvertence and mistake his specification is wrong and needs correction, and a re-issue is obtained with eleven different claims. These claims are quite different from those of the original patent, and are intended to give to the present proprietors a large and valuable monopoly. Here are some of the claims:

1. A water wheel, the floats of which have a discharge-line extending from the crown at their inner edge to the lower outer edge of the wheel.

2. The combination in a water wheel of a crown, buckets and floats, having their discharge-line extending from the crown at their inner edge to their lower outer edge.

3. The combination in a water wheel of a crown and floats having their discharge-line extending from the crown at their inner edge to the lower outer edge.

5. A water wheel having an effective inward flow and discharge of part of the water and an effective downward flow and discharge of part of the water simultaneously in the wheel, whereby the effective area of discharge is increased without increasing the diameter of the wheel.

Here is a sweeping generalization, which, taken literally, would give to the patentee a monopoly of all water wheels having simultaneously an effective inward and downward flow and discharge, whatever might be the shape of the floats, or of the crown. This was certainly not the invention described or suggested in the original patent. The invention of the wheel was not claimed at all—a wheel was described; but it was a wheel made after a particular pattern or form, and adjusted to a particular apparatus for the reception and discharge of the water. Its buckets were described as paraboloidal; its rim over the buckets curved downward and inward so as to force the water down rapidly in the lower curved parts or bottoms of the floats. No intimation was given that a wheel of a different form would answer the purposes of the invention. The defendants do not copy either of these features in their wheels. Their floats are not paraboloidal, but waving; the rim is not curved downward and inward, but is horizontal. It is very apparent why the claim has been generalized as it has been. The patentees des-

monopoly of every centre-vent wheel, of what term, which discharges the water both inwardly to the wheel and downwardly from the bottoms beneath the wheel. But that would be a new different from what was described and claimed in the patent. To warrant this extension of the specification of the re-issued patent contains more than that of the original, frequently stating that a part *may* be constructed thus and so, while the original *required* it to be thus and so; it speaks of the "horizontal edge of the floats," when no such edge was described in the original, but on the contrary the floats were described as curving inward and outward, as being so curved for a special purpose and for the purpose of correcting inadvertent mistakes in the construction which rendered the patent inoperative and void, and the amendments are evidently intended to widen the scope of the patent, and to make it embrace more than it did when the original description went, the original specification being the new one.

If the patentee (or his assigns) seems to have been misled that he was entitled to have inserted in a new patent all that he might have applied for and had in the original patent. The appellants produced evidence which tends to show that the patentee was misled by his original patent had made and done all which are embraced in or covered by the re-issued patent. If this were true, it would be nothing to the issue. A patent can only be granted for the same invention originally patented. If it were otherwise, a door would be opened to the admission of the greatest frauds. The extensions shown to be unfounded at the time, the lapse of a few years, after a change of officers in the office, the death of witnesses, and the dispersal of the parties, be set up anew and a reversal of the first decision without an appeal, and without any known or previous investigations on the subject. New ground is opened upon the patentee as the progress of invention, and as other inventors enter the field, the monopoly becomes less and less necessary to the patentee. It is easily generated in his mind an idea that his patent is really more broad and comprehensive than had been claimed in the specification of his patent. It is easy to see how a new light would naturally be reflected in a patent, and how unjust it might be to third parties who have kept pace with the march of improvement.

Hence there is no safe or just rule but that which confines re-issued patent to the same invention which was described or indicated in the original.

Since, therefore, any extension of the re-issued patent beyond the scope of the invention set forth and fairly indicated in the original specification, drawings, and model, would be fatal to the patent itself, we think that the appellants ought to be satisfied with the course taken by the Circuit Judge in so construing the patent with reference to those original tests as to restrain and confine the intent and meaning of the claims within legitimate and admissible bounds. And so construed, there is no plausible pretense that the defendant is guilty of an infringement.

If the appellants insist on the broad construction of the claims in the new patent, they must take the risk of being met with previous achievements in the same line of improvement, which may very seriously endanger the validity of their patent. Several structures have been produced on the hearing, antedating the invention of Swain, of which it would be very difficult to contend that they do not embrace the principal feature in Swain's wheel, sought to be appropriated by him.

If the evidence with regard to Stowe's wheels, constructed in 1837, 1841, and 1850, is to be relied on, it is not a sufficient answer to say that they were merely spout-wheels, and were never used under water as turbines. They are substantially the same wheel as Swain's, and whether used as turbines, or only under the operation of a spout, they anticipate his structure. The mere change of use by placing them in a different position with regard to the water is not patentable.

The Temple wheel, the Whitney wheel, and the Green wheel all conduct the water in the same lines that Swain does, from its entrance into the wheel to its final departure from it; and if, on an investigation of dates, we should find that either of these wheels antedated Swain's invention, we should probably be forced to the conclusion that they each contained the fundamental element of a simultaneous inward and downward flow and discharge of water through the wheel, which the appellants claim as the principle of Swain's invention.

We do not deem it necessary to go into a more particular examination of the evidence at this time. We have examined it carefully, and have come to the conclusion that the view taken of the case by the Circuit Court was as favorable to the appellants as they could reasonably ask.

The decree is affirmed.

Coast Law Journal.

APRIL 2, 1881.

No. 6.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed January 20, 1881.]

No. 6785.

JOHN SILVA, RESPONDENT,

vs.

HENRY DOBBLE, APPELLANT.

SHARES—ONE PARTY RECEIVING ALL THE PROCEEDS LIABLE FOR OTHER'S SHARE WITHOUT PREVIOUS DEMAND. Where parties, who farm land on shares, receives all the proceeds of products, he is liable to the other for the latter's share there need be no demand before action brought.

In the District Court of the Third Judicial District, County.

As to this action farmed a tract of land in county on shares, the land being owned by defendant commission merchant firm in San Francisco of both parties. Defendant, with consent of plaintiff, shipped the entire crop of 1876 to the agent for the shipment defendant instructed the agent to send the entire proceeds to his (defendant's) credit, accordingly done. This action was for the share of sale belonging to the plaintiff. The only defense was that there had been no demand made before the commencement of the action. There was judgment for plaintiff, defendant ap-

and *H. Kincaid*, for appellant.

and *W. P. Wiggin*, for respondent.

REMARKS:

No error in the record in this case. The judgment affirmed.

DEPARTMENT No. 1.

[Filed March 5, 1881.]

No. 6572.

PETER EARLY, APPELLANT,

vs.

THE TOWN OF REDWOOD CITY, B. F. DUNHAM
ET AL., INTERVENORS, RESPONDENTS.

ASSIGNMENT OF "ALL RIGHT, TITLE AND INTEREST" IN CERTAIN BONDS—SCOPE OF TRANSFER—BONDS NOT YET DUE. Where A assigned all his right, title and interest in certain bonds of Redwood City, except so much of the proceeds of said bonds as might be required to repay the Pacific Bank for moneys advanced to him; and it appeared that there were \$25,000 of bonds, \$20,000 of which had been paid to A, and were held by the bank as collateral security for money advanced, and \$5,000 which were lying in bank to be paid A in case of his performing all the conditions of a certain contract with Redwood City; and before the contract was entirely completed a garnishment was issued and served by a creditor of A: *Held*, there was nothing due to A when the garnishment was served.

GARNISHMENT AFFECTS ONLY EXISTING DUES. To attach tangible property or garnishee a credit, it is essential that the property or credit exist; if there is nothing owing at the time of garnishment, no lien is secured thereby upon sums which may subsequently become due.

Appeal from the District Court of the Twelfth Judicial District, San Mateo County.

Harmon & Galpin, for appellant.

McAllister & Bergin, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

It is urged by appellant that the assignment from John Caddy to intervenors does not include the three bonds of defendant, alleged to have been seized, under a writ of attachment, by appellant. The assignment is in words and figures following:

"REDWOOD CITY, May 23, 1877.

"For value received, I have sold and assigned, and do hereby transfer to B. F. Baker and Dunham, Carrigan & Co all my right, title and interest in the bonds of the town of Redwood City, known as the water works bonds, except so much of the proceeds of the sale of said bonds as is required to repay to the Pacific Bank of San Francisco all money advanced to me, and for which said bonds are held as collateral security, and I do hereby authorize and instruct the said Pacific Bank to transfer to B. F. Baker and Dunham, Carri

my right, interest and ownership, in accordance with the above agreement.

JOHN CADDY."

Appellant places some stress upon the words "title and interest" in the assignment, and insists that it was intended to transfer any interest in other bonds, why not assign the other bonds? The reason would seem to be sufficient, because the bonds had not been delivered to Caddy. Repetitive words of assignment would seem to show that—"all my right * * * in the bonds of the water works of the City of Wood City, known as the water works bonds."

Appellant's exception does not exclude from the transfer the bonds in which Caddy had a present or contingent interest.

All the bonds (\$25,000) which the town had issued were, at the date of the assignment, in the bank. Twenty thousand dollars of bonds had been delivered to Caddy, and by him pledged to the bank. If Caddy had \$5,000 in the bank Caddy would be entitled to \$25,000, in case he should perform all the contract, between him and the town, by him to build the water works. So much of the recital in the assignment as states that the "said" bonds were held by the bank as collateral, if taken literally, is an evident mistake—no doubt the "water works bonds" were so designated as a limitation upon the assignment. The last clause requires the bank to recognize the assignee as the owner of the bonds, by it held as collateral.

It is not possible to garnish property or credit, if it is not the property or credit exist. If, therefore, the town of Wood City owed Caddy nothing when a copy of the assignment was served upon the town officers, in the action against *John Caddy*, the plaintiff in such action cannot recover any sum, in cash or bonds, which might have come due to the town from Caddy. (C. C. P.,

Appellant's counsel for appellant that, inasmuch as but a small part of the whole contract price—\$23,103.83—had been paid prior to the alleged garnishment, while it appears on the bill of exceptions, that the work and materials furnished by him done and furnished were only of the value of \$9,500, there must have been due to Caddy at the time of the garnishment \$2,654.33.

Appellant's counsel further. By the terms of the contract between appellant and Caddy, the latter was to receive—in bonds—payment for all work done and materials furnished

in pursuance of the specifications. Prior to the submission to arbitration of his claim against the town he had received \$20,000, and the award in his favor was for the sum of \$3,103.83 in bonds, which, together with the sum already received, makes the exact amount he was to receive for work and materials according to the contract. The arbitrators therefore, allowed him nothing for extra work or materials. The bill of exceptions recites, "the work done and materials furnished by Caddy from the 16th of May up to the completion of the contract was worth \$449.50." In the fifth finding it is stated that "the whole of the \$25,000 in bonds were placed on deposit in the Pacific Bank, subject to the order of the President and Secretary of the Board of Trustees of said town of Redwood City, by whom checks or orders therefor were given to said Caddy as the work progressed," etc. The contract itself provided that the bonds should be drawn by check or order of the town in favor of Caddy for the amount that should be due the latter, "according to the certificate of the engineer in charge." The finding is not contradictory of this provision of the contract, since the checks may have been given "as the work progressed" upon "certificates of the engineer in charge," and we must suppose such was the fact. Prior to the 16th of May, then, the engineer had issued certificates on which had been issued orders amounting to \$20,000. It follows that there became due \$3,103.83, according to the contract, when Caddy subsequently completed the job in accordance with the specifications.

The fact that the Court found that the work done and materials furnished after the 16th day of May were really worth but \$449.50, was immaterial, since on the completion of the contract Caddy was entitled to all of the consideration which he had not already received. The contract provided "the whole amount of \$23,103.83 shall be paid to the party of the first part (Caddy) upon the full completion of said work," etc. It follows that when the town was garnished (May 1, 1877), no part of the \$3,103.83 was due to Caddy, the defendant in the action in which the attachment was issued.

Even if we could assume that the orders for the \$20,000 bonds were given without certificates from the engineer, the result would be the same. In the absence of any alleged fraud on the part of the engineer, Caddy would not be entitled to more of the contract price without the engineer's certificate, because he had already received \$20,000 without such certificates.

Order affirmed.

We concur : Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 22, 1881.]

No. 6361.

N, APPELLANT, vs. HOLMES, RESPONDENT.

PROMISE BY—PRACTICE—NEW TRIAL. An executor, acting with and for the interest of the estate, may compromise a claim against the estate, without preliminary authority from the court. In such case the executor is bound to act as a prudent person would act were the debt his own. Section 1241 of the Code of Civil Procedure is not restrictive of the common law powers of executors, but is intended to afford them additional powers, when acting in good faith, in the exercise of their common-law powers. A failure to find according to the facts, and finding against the evidence, is ground for new trial. The granting of a new trial is within the sound legal discretion of the Court, and its exercise cannot be reversed unless a plain abuse of discretion is shown. Where findings of fact and conclusions of law were made, and the findings of fact are contrary to the evidence and findings of fact.

In the District Court of the Fourth Judicial District, County of San Francisco.

Moulton, for appellant.

Morrison and *H. K. Moore*, for respondent.

delivered the opinion of the Court:

An action brought by the plaintiffs as executors of *B. F. Moulton*, deceased, to set aside a settlement made between the defendants *Holmes* and *Moulton*, and the release executed in consideration thereof, and for an accounting of the dealings and transactions of the estate, and the management and sales of certain real estate as the trustee of *Moulton*.

It was alleged in the complaint that the settlement was made for the benefit of the estate; that it was made without the knowledge of the executors and the approval of the Probate Court, and under a mistake as to the insolvency of *Holmes*, and was induced by false and fraudulent representations of *Holmes* for the purpose of cheating and defrauding *Moulton* out of the moneys which he had in his hands, and of appropriating them to his own use.

In his answer, *Holmes* denied the allegations of the complaint, and in the issues made by the pleadings, the cause was referred to a referee to take and state an account of the dealings of *Holmes* as the trustee of *Moulton*. Upon the report of the referee the Court below made and filed findings of fact, and gave judgment for the plaintiffs for

the sum of \$57,545.66 with interest and costs. But afterwards, upon a motion made by the defendant Holmes for a new trial, upon the grounds that the evidence was insufficient to justify the findings of the Court and that the decision was against law, the Court ordered a new trial, and from this order comes this appeal.

Presumptively, the order is correct; and it is incumbent upon the appellants to show that the Court erred. They contend that it was error to grant a new trial, because the release, executed in consideration of the settlement between Holmes and Moore, was voidable, if not void, for the reason that Moore had no authority from Moulton, or from the executors of his estate, to make the release, and it was never approved by the Probate Court.

The release itself was not so much the object of attack as the consideration for which it was given. Having been given in consideration of the settlement of accounts or transactions between Holmes and Moore (acting as the attorney of the executors), the object of the action was to impeach the settlement for fraud and want of authority.

The Court found that there was no fraud in the settlement, and that it had not been made or approved by the Probate Court. But it did not find that it had been authorized by the executors, although it found probative facts from which that fact ought to have been deduced. For it found in substance that Moulton was in his lifetime the owner of 113 lots of land in the City and County of San Francisco, and on the fourteenth day of August, 1868, he conveyed them, by a contract in writing, to Holmes for the sum of \$90,000. Of this amount, \$43,526 were paid at the time of the transaction, leaving due and unpaid a balance of \$46,474, which, by the contract, Holmes agreed to pay as follows, namely: By buying in an outstanding title to some of the lots "on such terms as he and Moulton might agree upon," and by putting them all in market and selling them from time to time as he could, and after paying the unpaid purchase money in that way, he agreed to divide the net proceeds of the sales equally between himself and Moulton, after payment of the expenses, etc., attending the management and sales of the property. Several sales were made under the contract, and a portion of the moneys realized from them was paid to Moulton.

On the twentieth of October, 1868, Moulton assigned the contract to the defendant Moore, to the extent of \$8,000, and authorized him, as his attorney, to collect from Holmes any money which might be coming to him from sales made by Holmes. Afterwards, on the nineteenth of October, 1869,

his right, title and interest in the lands, by deed, to Moore, with intent to make Moore his son after the making and delivery of this deed. The appellants became his executors, and Moore acted as attorney for the estate.

vs. Nevine, 50 Cal. 279, it was held that this was Moore, and the contract entered into with the testator no interest except an interest in the lands which the lands were to be sold under the conditions. The precise sum to which the testator was entitled could only be ascertained upon accounting. The sum first had with Moore and Holmes. The surplus, if any, belongs to the estate of the testator, and the executors are entitled to an accounting concerning it. In this sum, Holmes and Moore made the settlement, now sought to be impeached. Result of the case is that Holmes conveyed to Moore, in trust for the benefit of being all of the unsold portions of the land devised to him by the testator. Moore executed and delivered a release, in which was acknowledged the delivery of the conveyance, and that there had been no payment from Holmes, by Moulton in his lifetime and at his death, the sum of \$66,811 on account of the proceeds of sales and sales under the contract, and that in reliance thereof, he, "as owner and assignee of the contract, annulled and annulled the contract and released Holmes from all liability on account of it.

The court did not find that Holmes was, in fact, insolvent at the time of the settlement, or that he represented himself to the executors as such, or that he advised and confirmed afterwards ratified it. On the contrary, it was found that the executors did not consent to the settlement or that they did not authorize it, except on the condition that Moore should satisfy himself that Holmes was solvent to the extent of \$80,000, and that Moore never did find that Holmes was insolvent to that extent.

The examination of the record satisfies us that the issues on these matters were not sustained by the evidence concerning them is not conflicting; it is clear; and it proves beyond question that Moore acted on reliable authority that Holmes was insolvent to the extent of his knowledge to the executors, and that he agreed with him upon the subject of Holmes' estate and that it was best that a settlement should be made. They accordingly advised Moore to settle on the best terms he could get." At their

solicitation Moore made the settlement and informed them of all that had been done. "They did not disapprove of it," but received the property which had been conveyed by Holmes in trust for the estate. When they received it they knew that both Holmes and Moore had mortgaged it before the settlement, and knowing that fact, they, by an agreement in writing, assumed payment of the notes and mortgages made by Moore, and agreed to save Moore harmless from any liability on account of them.

Instead of a finding that the executors did not consent to the settlement or authorize it to be made, the Court should have found that they did consent to it and authorized it.

The failure of the Court to find according to the facts, and the finding of certain material facts being against the evidence, that reason alone was sufficient to authorize the Court below to grant a new trial. And even if the evidence had been conflicting, and the Court was satisfied that it had erred in adjudicating it, this Court would not disturb the decision; for a motion for a new trial is a motion addressed to the sound legal discretion of the Court, and the appellate Court will interfere only in case of a plain abuse of such discretion. (*Hull vs. Bark Emily Banning*, 33 Cal. 525.)

As the Court found that the settlement sought to be impeached was made without fraud, it was a material fact to be found that it was authorized by the executors; for if it was a fair and honest transaction, made by the authority of the executors and in the interest of the estate, it was unimpeachable. Executors and administrators have the legal right to compound and discharge debts due to their testator or intestate. (3 P. Wms. 381; 10 S. and M. 404; *Chadburne vs. Chadburne*, 9 Allen, 173.) "An administrator," say the Supreme Court of Virginia, "is invested with full dominion over the assets of the estate and with full discretion for the liquidation and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors, and give them confessions of judgments. * * * And if he acts fairly, in good faith, and with due regard to the interests of the estate, the distributees will be bound by his acts and he will be protected." (*Boyd vs. Ogelsby*, 23 Gratt. 674.) "An executor is not only bound to compromise and release a debt when the interests of the estate require it, but he would be guilty of culpable neglect if he should fail to do so and lose the debt. He is bound to act in such a case as a discreet and prudent man would act were the debt his own." (*In re Scott*, 1 Redf. R. 236.)

Such a power belongs to all trustees for the benefit of the

and they have the right to assume the responsibility of the necessity of its exercise. The circumstances which may render it necessary are presumably to them than to any one else. Executors and administrators have, therefore, never been required to obtain authority for that purpose from the Probate Court, and the judgment had to be ultimately approved by the court when they came to render an account of their

conduct under the Code of Civil Procedure, which provides that whenever a debtor of a decedent is unable to pay the debts, the executor or administrator, with the approval of the Probate Court or Judge, may compound with the debtor and give him a discharge upon receiving a fair and reasonable value for his effects. A compromise may also be authorized if it appears to be just, and for the best interest of the estate, and is intended for the protection of the executors and administrators, and is not restrictive of their common law powers. "It is not to be doubted," says the Supreme Court of Hampshire, in construing a similar statute, that the passage of the statute authorizes an administrator to compound with the debtor and receive less than the full amount of the debt, if he could show that what he did was beneficial to the estate. But he acted in some cases without objection; for if an objection was taken, the burden was on him to show that he had acted judiciously, and that the estate had not been prejudiced by the compromise. The statute, in fact, removed all difficulty, and perhaps also to remove doubts as to the validity of the statute, the statute has provided a mode in which an executor or administrator may compromise with a debtor with perfect validity without being subjected to expense in sustaining the compromise. But the right to compromise, which existed before the passage of the statute is not taken away. It may be exercised as before, subject to the same limitations (see *Wyman's Appeal*, 13 N. H. 18.) And in *Ward v. Ward*, 21 N. Y. 179, where it was objected that the executor could not obtain the authority of the Surrogate to compromise the claim of an estate pursuant to a statute which provided that the executor could not do so, it is said: "The object of the statute was not to take away the executors and administrators powers which they would not possess, but to afford them additional powers when acting in good faith in the exercise of their common law powers. Although they could compromise a debt without the aid of the statute, they are, nevertheless, perhaps, to be held responsible for any serious

error in judgment in so doing. The statute enables them to obtain the sanction of the judgment of the Surrogate in addition to their own, and thus affords them additional protection if their conduct is fair and honest."

Besides, the findings in this respect were not only unsustained by the evidence, but some of the findings of law were against law; for the Court found that of the 113 lots eleven of them were sold at auction, and the net proceeds of the sale applied to the extinguishment of a balance due upon the purchase money of the outstanding title which Holmes had bought in, pursuant to the terms of the contract, yet it found as matter of law, that Holmes was not entitled to be credited with that sum. This decision was contrary to law, because the outstanding title was purchased for the benefit of Holmes and the testator, and the amount paid for it was to be credited upon the balance of the unpaid purchase money.

Where a finding of fact is against the evidence, and a finding of law is contrary to the finding of fact, it is not error in a Court to grant a new trial.

Order affirmed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 2.

[Filed January 24, 1881.]

No. 7549.

THE PEOPLE EX REL. I. DANIELWITZ, PETITIONER
VS.

EDWARD E. HARVEY, RESPONDENT.

TRIAL OF TITLE TO AN OFFICE NOT WITHIN ORIGINAL JURISDICTION OF SUPREME COURT. The Supreme Court has no original jurisdiction to try title to an office.

APPLICATION TO SUPREME COURT FOR WRIT OF MANDAMUS. The respondent claimed to have been elected at the general election of 1880 to the office of School Director, in the City and County of San Francisco. The respondent was the incumbent.

McElrath & Euls and *J. Rothchilds*, for petitioner.

By the COURT:

This is a proceeding commenced in this Court to try title to an office. The Court has no original jurisdiction in such a case. The order to show cause is therefore discharged and the proceedings dismissed.

DEPARTMENT No. 2.

[Filed March 19, 1881.]

No. 6745.

R, APPELLANT, VS. CLARK, RESPONDENT.

OF AGAINST REPRESENTATIVE. An action based upon imprisonment of plaintiff, at the instigation of defendants cannot be maintained against the representative, unless it is kept alive by statute. Such grievance is not within the scope of an action where intestate has "wasted, destroyed, carried away, or converted to his own use, the goods or property of another."

in the Twelfth District Court, San Francisco.

for appellant.

en, for respondent.

delivered the opinion of the Court:

plaint avers that defendant's intestate in his lifetime probable cause commenced a suit against plaintiff, and obtained an order for the issuance of a writ for the arrest and imprisonment of the plaintiff, Mary A. Harker, of which writ she was arrested and imprisoned. Such arrest and imprisonment was adjudged to be contrary to authority of law, and that in procuring her release plaintiff called to and did employ an attorney and paid his services therein \$500. The complaint also avers that the intestate, the appointment of defendant as executor, and the presentation and disallowance of a claim for \$500. To the complaint the defendant demurred, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, whereupon judgment went for defendant.

It is clearly within the maxim, "a personal right is lost by the person," unless the right of action has been preserved by some statute. (Broom's Legal Maxims, 6 Wait's Practice, 329, and cases there cited.) Under which the plaintiff claims a right to recover under § 4, Code of Civil Procedure, by which a person may maintain an action against the executor or administrator or intestate who in his lifetime has wasted, taken or carried away, or converted to his own use the goods or chattels of any such person." The plaintiff did not by the arrest or imprisonment, or by procuring the plaintiff Mary A. Harker to pay \$500, waste, destroy, take or carry away, or con-

vert to his own use the goods or chattels of said Mary Harker.

Judgment affirmed.

We concur: Thornton, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed March 17, 1881.]

No. 6864.

BROWN, EXECUTOR, APPELLANT,
VS.

WITTS, RESPONDENT.

PRACTICE—FINDINGS. Where the findings are sustained by the evidence, judgment will be affirmed.

Appeal from the District Court of the Nineteenth Judicial District, City and County of San Francisco.

Chas. H. Phelps, for appellant.

W. H. Allen, for respondent.

MYRICK, J., delivered the opinion of the Court:

The defendant executed to one Sbarboro a mortgage, as cited therein, "to secure the payment of the sum of \$2,500 indebtedness." The mortgage is dated August 16, 1876. On the sixteenth of November, 1876, Sbarboro transferred the mortgage to one Mitchell as security for the sum of \$2,500 loaned to him by Mitchell. Mitchell has since died, and plaintiff is his executor. No note accompanied the mortgage. The Court below found that the mortgage, according to its terms, was due and payable August 16, 1876, and that plaintiff's testator received it after maturity and subject to the equities existing between the parties thereto; that there was no debt due said Sbarboro by defendant at the time of the giving of the mortgage; that there was no consideration for the mortgage, and that the same was not negotiable; that defendant had not been guilty of any fraud or negligence to the plaintiff's detriment, and that plaintiff acquired nothing by the purchase of the mortgage as against defendant. The Court upon the Court rendered judgment for the defendant.

The findings were sustained by the evidence; and we think that the conclusions of the Court upon the facts found were correct.

Judgment and order affirmed.

We concur: Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed March 21, 1881.]

No. 6539.

APPELLANT, vs. HARRIS, RESPONDENT.

NOTICE—EXCEPTIONS—AUTHENTICATION OF PAPERS. An appeal will not take judicial notice of proceedings in lower court. Record of such proceedings must be authenticated in the proper manner by law. Though an order be "deemed accepted" to, the Court will not review the ruling, unless the exception is stated and settled in a bill within the statutory or reasonable time. Affidavits or papers used on the hearing below must be authenticated as having been used, else they form no part of the appeal.

Filed in the Nineteenth District Court, City and County of San Francisco.

Filed for appellant.

Filed for respondent.

Delivered the opinion of the Court:

Appeal from an order sustaining a motion to set aside a judgment rendered against the respondent.

The question in this Court is that the motion was properly made; and the burden is upon the appellant to show error in the decision of the Court below was erroneous. It is shown by the record of the proceedings that the motion was brought before us. An appellate tribunal has no judicial knowledge of proceedings in lower court, but only act upon a record of the proceedings as the mode required by law.

The question was argued and decided in the lower court. The appellant was present and reserved the decision of the Court. But, according to the Code of Civil Procedure, an appealable judgment is deemed to have been excepted to." Yet a party who appeals to a decision of a Court, whether he excepts at the time the decision was made, or is required to have excepted, must, in statutory or reasonable time, after his exception, avail himself of the right to come to writing and take the steps required by the bill of exceptions settled and signed by the court. Nothing occurred in the course of the trial or proceedings which ought to be made part of the record, it is that mode or by some other equivalent justification. If it is not done, the appellate Court

is without the means of knowing what the matters were upon which the decision was made which is sought to be reviewed.

The appellant contends that the Court below erred in setting aside the judgment against the respondent, because the affidavits and papers used on the hearing of the motion showed an abuse of discretion. But there is no bill of exceptions containing the papers and affidavits which were used. The transcript contains certain affidavits and a paper purporting to be the reporter's minutes of testimony taken at the trial of the case. But none of these documents is in any way authenticated.

In *Pieper vs. Centinella Co.* (October session, 1880), the Judge of the lower Court certified to the papers which were used on the hearing of a motion for a change of the place of trial, and those papers were inserted in the transcript and were identified as being the papers referred to in the certificate, and it was held by Department Two of this Court that the papers were, by the certificate of the Judge, made part of the record in the case. The certificate of the Judge was thus made equivalent to a bill of exceptions.

But here there is no such authentication. No papers or affidavits are in any manner referred to or marked or identified as being the papers and affidavits which were used on the hearing. There is a recital in the order itself that "the motion was made on the papers and pleadings on file," and the transcript contains affidavits indorsed "filed"—some of which appear to have been so indorsed on the day of the date when the order was made, and others a month before. But there is no mark by letter, number or other means of identification, to indicate them as the papers which are referred to in the order or transcript; and the paper in the transcript purporting to be the reporter's minutes of testimony taken at the trial, is not indorsed at all as one of the papers on "file."

We cannot indulge in presumptions of papers which were used in the Court below on the hearing of a motion. To be considered they must be made part of the record of the case by a bill of exceptions, or be authenticated by the Judge who tried the case, in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided. Unauthenticated papers in a transcript in which there is no bill of exceptions, constitutes no part of a record which can be considered upon appeal.

Order affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed February 15, 1881.]

No. 6677.

THOMAS W. CORDER, RESPONDENT,

VS.

HENRY N. MORSE, APPELLANT.

CONDITION IN CONVERSION ACTION. Where in case of a conversion of personal property defendant was granted on condition that he would pay the costs taxed in the action: the order was within the power of the Court

in the District Court of the Third Judicial District of Nevada County.

action to recover certain wool alleged to have been lawfully and unlawfully taken by defendant, or its value, to the sum of \$1,500 and damages. Defendant denying the taking of other things, that he seized the wool as in and to an execution in the case of *A. A. Pardow vs. Henry N. Morse and W. H. Corder*; that plaintiff was in part interested in them; that the property was the property of Francis A. Pardow, and that he had seized the same because he was unable to find any individual property of Francis A. Pardow. The plaintiff recovered judgment for the value of the wool, and costs.

Defendant moved for a new trial, and an order was made granting a new trial on condition that defendant should pay the costs taxed in the cost bill on file, within five days. Defendant afterwards moved to make the order granting a new trial absolute and unconditional, or to have the same set aside. The latter motion was denied. Defendant then moved to set aside the judgment, from the order granting a new trial, and from the order refusing to make the order absolute.

Pardow, for appellant.
Corder, for respondent.

REMARKS:

There is no error in the ruling of the Court below in this case. The judgment and orders appealed from are

DEPARTMENT No. 1.

[Filed March 22, 1881.]

No. 7471.

LANG, RESPONDENT, vs. SPECHT, APPELLANT.

APPEAL—DISMISSAL OF—FORMER MOTION. A party moves to dismiss an appeal on several grounds, one only of which is argued by counsel and considered by the Court in denying the motion: *Held*, that the party could not, after the denial, again move on other of the grounds contained in the former motion, not considered by the Court, for the reason that the former decision had become the law of the case, and all the grounds were presumptively considered by the Court.

Appeal from the Superior Court, of the City and County of San Francisco.

J. C. Burch, for respondent.

F. J. Castlehun, for appellant.

McKEE, J., delivered the opinion of the Court:

This the second motion to dismiss the appeal in this case upon the grounds that the printed transcript of the record was not filed within forty days after the appeal had been taken, nor was a copy of it, or of the written transcript, served upon the respondent; nor is there upon the transcript, as filed, any written evidence of its service, or of a waiver of such service, as required by Rule 2 of this Court.

The appeal was taken on the thirteenth of September, 1880. The printed transcript is indorsed, filed December 24, 1880—more than sixty days after the taking of the appeal; and there is nothing in the record showing that the time for filing the printed transcript had been extended. That being the case the respondent was entitled to move for a dismissal of the appeal. But he has heretofore exercised that right; for on the sixth of December, 1880, he made a motion to dismiss the appeal on those grounds and on the additional ground that the appeal bond was insufficient, because "it consisted of an undertaking in the sum of \$300, coupled with an undertaking to stay execution in the sum of \$2,668, embraced in one instrument, under Section 947 of the Code of Civil Procedure, and the sureties thereto had failed to justify, and no other or sufficient sureties or undertaking had been filed within the time prescribed by law."

That motion was argued by counsel, solely, upon the last ground, and the Court denied the motion, holding upon the authority of *Schact vs. Odell*, 52 Cal. 449; and *Hill vs. Finni*

311, that the appeal was not affected by the failure of the court to justify. It therefore refused to dismiss the appeal. That decision is decisive of all the points which were involved in the motion.

It is urged that, although the grounds of the present motion were contained in the precedent motion, they were not argued in argument, and consequently were not passed upon by the court's decision. The non-argument of them, however, is immaterial. Having been made distinctive grounds of the present motion, which was submitted and decided, they were previously considered by the Court; and its decision, whether it applied to them or not, or was valid or erroneous, must be taken as the law of all the points involved in the motion, and is obligatory upon the Court and the parties to it. (*Jaaffe vs. Skae*, 48 Cal. 346; *Yates vs. Smith*, 40

Cal. 311.) The motion being made upon the same grounds which were contained in the precedent motion is, therefore, dismissed. It is so ordered.

For: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 22, 1881.]

No. 6770.

CALIFORNIA SUGAR MANUFACTURING COMPANY,
APPELLANTS,

vs.

JOHN SCHAFER, RESPONDENT.

—CORPORATION. Defendant and others signed a subscription for the incorporation of a company. "Whereas, it has been resolved to incorporate a company to be known as the California Sugar Manufacturing Company, we therefore agree to take the number of shares set opposite our names," etc. The plaintiff was not a subscriber to the paper when signed by the subscribers, nor a successor of the subscribers, nor did the subscribers join in forming the corporation, nor become members thereof: *Held*, that plaintiff could not recover the subscription: *Held*, further, that if the subscription could be treated as an agreement to purchase stock of the company, there was no contract, for the reason that the presumption is that the subscription had no stock to sell. A party subscribing for stock of a corporation is to be treated the same as the stockholders, and is not liable for more than the amount of an assessment duly levied.

From the Third District Court of the City and County of San Francisco.

C. S. Roe, and N. Hamilton, for appellants.

Tilden and Wilson, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The action was brought to recover of defendant the sum of \$500 by reason of his subscription to the paper-writing following: .

"Whereas, it has been resolved to incorporate a company under the laws of the State of California, for the purpose of manufacturing sugar from melons and other fruits, to be known as the 'California Sugar Manufacturing Company,' we therefore, for the purpose of raising a working capital, agree to take, and hereby do subscribe to the number of shares of the working stock of said company, set opposite our respective names, agreeing to take the same and pay therefor \$5 in gold coin for each share subscribed for by us respectively—\$1 per share, to be paid at the time of subscribing, and \$1 more per share every thirty days thereafter, until the whole \$5 shall be paid into the treasury—in case it is required.

CALIFORNIA SUGAR MANUFACTURING COMPANY.

J. POOL,

F. A. ROE, •

[Seal.]

Secretary.

President.

No. Shares.	No. Shares.	Signatures.	Date.
Fifty shares.....	50.....	P. H. Gardiner.....	6/19
Fifty Shares.....	50.....	J. F. Wilcox.....	6/19
One hundred shares.....	100.....	John Schafer.....	6/19"

(And other persons whose names are here omitted.)

The words "California Sugar Manufacturing Company, J. Pool, Secretary; F. A. Roe, President," were inserted, and the corporate seal affixed, at some time after the other names were subscribed.

The plaintiff was not a party to the subscription paper, nor has it acquired any rights under it, as successor of the subscribers (other than defendant) or otherwise. No one of such subscribers is shown to have joined in the formation of the corporation plaintiff, or to be a member thereof."

The present action is not brought to recover an assessment.

If the subscription paper could be treated as an agreement to purchase stock of the company, there would be no mutuality in the contract, since the presumption is that the corporation had no stock to sell. (Civil Code, Secs., 343, 344.) The complaint does not allege, nor does the evidence establish, that plaintiff owned any stock or that the disposition of stock by sale was authorized by the by-laws, or by vote of the stockholders.

scription paper was signed after the corporation and even if the subscription can be considered a subscription for stock, plaintiff has no right to treat the subscribers differently from other stockholders to recover from them other than the amounts of stock duly levied.

and order affirmed.

For: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 22, 1881.]

No. 6591.

O, APPELLANT, vs. CURREY, RESPONDENT.

CITATIONS—WRONGFUL EXECUTION. Defendant having sued for execution upon a judgment which had been satisfied, and the plaintiff having been restrained by injunction, which last proceeding was affirmed by the Supreme Court: *Held*, in an action brought to restrain the sheriff from suing out the execution, that the Statute of Limitations commenced to run at the date of the issuance of the writ of execution.

from the Nineteenth District Court, City and County of San Francisco.

Plaintiff, for appellant.

Defendant, for respondent.

Justice, delivered the opinion of the Court.

In this case, the defendant had recovered a judgment against the plaintiff in the case, in the late District Court of San Francisco, which was satisfied by the plaintiff in January, 1873, notwithstanding the satisfaction, defendant, on the 1st of March, 1873, caused an execution to be issued upon the judgment and placed in the hands of the Sheriff of that county orders to levy it on the real property of the plaintiff. On the same day, the officer did, in obedience to the orders, levy the execution on certain lands of the plaintiff and advertised to sell them under the levy of the execution. To restrain this threatened sale, the plaintiff brought an injunction suit, in which he recovered judgment against the defendant, on the twenty-seventh of September, 1873, perpetually enjoining the enforcement of the execution. This judgment was affirmed by the Supreme Court, on the October term, 1874; and on the twenty-seventh of January, 1875—more than two years and six months

after the issuance of the execution—plaintiff commenced the action, out of which this case arises, to recover damages for maliciously issuing the execution. The lower Court sustained a demurrer to the complaint in the action, upon the ground that the cause of action was barred by Subdivision of Section 339 of the Code of Civil Procedure, and that is the question.

By the section referred to, two years is prescribed as the period within which must be commenced an action upon an obligation or liability not founded upon a written instrument of writing. "Liability" is defined: "Amenability or responsibility to law; the condition of one who is subject to a charge or duty which may be judicially enforced." (Abbot's Dict. 38.) And it may arise from contracts expressed or implied, or in consequence of torts (Bouvier's Dict. word "Liability.") The liability sought to be enforced in this action was one which originated in tort. When the defendant caused an execution to be issued upon the satisfied judgment, and to be levied upon the property of the plaintiff, he was guilty of a breach of duty which rendered him amenable to the plaintiff for damages. This breach of duty constituted the gist of the action which the plaintiff brought against the defendant; and his right of action accrued at the time of the breach of duty, and not when the judgment in the injunction suit was rendered or affirmed by the appellate tribunal. And the Statute of Limitations commenced to run from the time of the alleged breach of duty. When misconduct or negligence constitutes a cause of action, the Statute of Limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence. (*Pillar vs. S. P. R. R. Co.*, 52 Cal. 43; *Harpenden vs. Meyer*, 55 Id.; *Howell vs. Young*, 5 B. & C. 266.) The running of the statute in this case, therefore, commenced to run on the fourth of March, 1873—the day when the execution was wrongfully issued and levied, and it was not suspended by the injunction proceedings to restrain the enforcement of the execution.

But it is contended that the damages which plaintiff was entitled to recover did not accrue until the litigation resulting from the suit by injunction had been ended by the judgment of the Supreme Court. Damages which result from a tort do not constitute separate causes of action. They are part of the tort itself—for which the cause of action is given; and the cause of action arises immediately on the happening of the injury and is not postponed to the damages thereby occasioned. (Angell on Lim., Secs. 298, 299, 300.)

prescribed by the statute had run before the
 ended his action, his cause of action was barred.
 affirmed.

Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 7, 1881.]

No. 7423.

THOMAS SCOTLAND, RESPONDENT,

VS.

COCH MINING COMPANY, J. W. SMITH

J. L. CRITTENDEN, APPELLANTS.

APPEAL FROM A JUDGMENT WHICH IS ONLY AGAINST OTHER
 A defendant against whom no judgment is rendered cannot
 a judgment against a co-defendant.

in the District Court of the Twenty-first Judicial
 as County.

action to foreclose a mechanics' lien for work
 formed by plaintiff as a miner on certain placer
 s of the defendant corporation. Defendants
 Crittenden were made parties on account, as
 having some interest in the property sought to
 o the lien. The findings and decree adjudged
 he plaintiff, and ordered the property of the
 fected by the lien to be sold and the proceeds
 payment of the claim, but made no mention
 e to defendants Smith and Crittenden.

Crittenden, M. L. Moses and E. T. Hogan, for

gg, for respondent.

RT:

e an appeal from the judgment is prosecuted
 Smith and Crittenden, against whom no judg-
 n rendered. The appeal is therefore prema-
 and should be dismissed.

o an appeal by Crittenden from an order re-
 aside a judgment by default against him.
 been no judgment against him, this appeal is
 bly taken.

are therefore dismissed.

DEPARTMENT No. 1.

[Filed March 22, 1881.]

No. 6450.

JANES, APPELLANT,

vs.

THROCKMORTON, RESPONDENT.

TRUST—EQUITABLE CONVERSION—SALE OF DECEDENT'S REAL ESTATE—HEIR TO SUE FOR CONVEYANCE OF TITLE. Defendant, in consideration of the conveyance of an incumbered estate, covenanted that he would pay the indebtedness out of the estate, and if any money or land remained after payment of the indebtedness, he would convey one-fifth part thereof to parties named in the covenant. *Held*, that a trust was created and the beneficiaries named in the covenant acquired an estate in the land to the extent of one-fifth interest, contingent upon the sale of all the lands, and upon the sufficiency of the lands to pay the debts. During the Trusteeship, defendant, as the result of certain judicial proceedings and compromises, and by mortgaging the estate, acquired a conveyance to himself from lien holders, etc., portions of the estate. *Held*, that the title thus acquired by him inured to the beneficiaries of the trust, in the proportion of one-fifth interest. To change the quality of land to money there must be a clear intention to that effect; otherwise the property retains its original character. A mere discretionary power of selling produces no such effect. Real estate of a decedent can only be sold in the mode prescribed by law. An order of the Probate Court directing a sale of the personal estate of the decedent does not authorize a sale of the real estate. The ancestor of plaintiff having acquired the interest in the beneficiaries under the covenant, held, that his heirs, and not the administrator, were the proper parties to sue for a conveyance of the title.

Appeal from the Nineteenth District Court, City and County of San Francisco.

Dowthitt & McGraw for appellant.

Wm. Irvine for respondent.

Ross, J., delivered the opinion of the Court:

This action is brought to enforce an alleged trust. Defendant had judgment in the Court below, and the plaintiff appeals from the judgment and from an order denying the plaintiff a new trial. The case is one of considerable interest, not only because of the questions, but also by reason of the amount involved. The questions, however, in our opinion are not difficult of solution. So far, as material to be considered, the facts are as follows: On the ninth of February, 1856, one William A. Richardson conveyed by deed to the defendant, Throckmorton, the Saucelito Rancho, situated in Marin County, the Albion Rancho, situated in Marin

, and certain real property situated in San
Maria A. Richardson, wife of William A.
Stephen Richardson, his son, Mariana Torres,
and Manuel Torres, her husband, joined in
though they had no interest in the property. At
the execution of the deed to defendant a coven-
anted, signed by all of the parties to the deed, in
defendant, in consideration of the conveyance to
ed as follows: "That I, the said Throckmor-
and dispose of so much of the above-men-
estate (namely, the estate conveyed by the
y deem necessary to liquidate, pay off or dis-
debts and incumbrances which constitute liens
ty, or any part thereof, at the time of the ex-
deed last above mentioned. And after all such
incumbrances shall be discharged or extinguished,
all such debts and incumbrances as may be a
re lien upon said premises, that I, the said
, will account and pay over to said Stephen
and Mariana Torres, the one-fifth part of all
ning on hand, if any there be, arising from
real estate after the discharge of such indebted-
nesses accruing in the transaction of said busi-
at I, the said Throckmorton, shall sell all of
above described within three years of the
or will, at my option, convey the undivided
of all the lands remaining unsold after the dis-
debts and expenses, to said Stephen Richard-
na Torres. And that I, the said Throckmor-
ve from sale, and after the liquidation and
id debts and liens, will convey, free from all
created by me, the said Throckmorton, to the
Richardson, for the use of the said Maria A.
wife of the said William A. Richardson, the
on which the said Richardson now resides,
out one square-mile of land, bounded as fol-
* And it is understood and agreed by and
parties to these presents that the liability of the
orton, the party of the first part, for the pay-
charge of said debts, mortgages, liens or judg-
lands, shall be limited to the amount of the
h he may receive from the sale or disposition
aforesaid."

of the conveyance to the defendant—to wit,
356—William A. Richardson was largely in-
ere were then existing liens on the property

conveyed. Among other liens, there was a mortgage upon the Saucelito Rancho executed by the said William A. Richardson to one Joseph Black, and by him assigned to J. Mora Moss, which mortgage had, at that date, been ripened into a decree of foreclosure. There was also then existing another mortgage upon the Saucelito Rancho, executed by the said William A. Richardson to one Barton Ricketson, which mortgage was about to be foreclosed. Shortly afterwards to wit, on the eighteenth of February, 1856—an action was commenced in the Seventh District Court to foreclose the last mentioned mortgage, in which action the said William A. Richardson, Stephen Richardson, Maria A. Richardson, Mariana Torres, Manuel Torres and others were made defendants, as were also the defendant, Throckmorton, and the said J. Mora Moss, assignee of the Black mortgage. The complaint in that action prayed judgment of foreclosure and sale of the mortgaged premises to satisfy both of the mortgages mentioned. All of the defendants were personally served with the summons in the action. Afterwards, and in the month of April, 1856, said William A. Richardson died testate in the county of Marin, and the said Manuel Torres was duly appointed executor of his estate by the Probate Court of said county. To prevent forced sales of the property, and to afford defendant, Throckmorton, the time and opportunity to find purchasers and make sales of the property to pay and discharge the indebtedness of said William A. Richardson, he (defendant) exerted all the means in his power to hinder and prevent the prosecution of said foreclosure suit to judgment; and in the meantime he made strenuous efforts to make sales of the lands in order to discharge the debts of the said William A. Richardson and free the property of the incumbrances, but he was then unable to consummate any sale.

On the sixth of March, 1863, judgment was entered in the District Court in the foreclosure suit of *Ricketson vs. Richardson et als.* An appeal having been taken to the Supreme Court, the judgment of the District Court was directed to be modified, and accordingly, on the thirty-first of October, 1862, a final decree of foreclosure and sale was entered in the action, by which it was directed that the lands of the Saucelito Rancho (except the homestead) should be sold, and that out of the proceeds of the sale the J. Mora Moss mortgage be first paid, and that next the Ricketson mortgage should be paid. Under this judgment the Sheriff of Marin County, on the fifth day of June, 1863, sold all of the lands of the Saucelito Rancho (except the homestead of Richan

wn of Saucelito) for the sum of \$84,000, that
nt of the judgment, including the expenses
rd F. Stone became the purchaser at the sale,
he Sheriff's certificate.

tificate had been issued to Stone, but before
d executed to him a deed—to wit, on the
September, 1863—the defendant, Throckmor-
Richardson, Stephen Richardson, Manuel
a Torres, and Manuel Torres as executor of
William A. Richardson, deceased, and others,
action in the Seventh District Court against
ne and others for the purpose of vacating and
said sale to Stone, the complaint in which
ified by the defendant, Throckmorton, and
of the grounds entitling the plaintiffs to the
that he, Throckmorton, together with Torres,
the estate of William A. Richardson, de-
structed the Sheriff to sell the property under
foreclosure and sale in subdivisions, which
e Sheriff had refused to observe, and that in
structions he, Throckmorton, and Torres, as
re acting in the interest and on behalf of
the other complainants." Stone answered in
between the date of the filing of the complaint
g of Stone's answer—that is to say, on the
ember, 1863—the Sheriff executed to Stone a
property sold to him at the foreclosure sale.

ing been transferred from the Seventh to the
ict Court, it came on afterwards for trial, and
of December, 1864, there was entered in the
said Fifteenth District Court the following:
on et al. vs. Stone et als. This action having
e tried and submitted on the proofs of the
ies, and due deliberation having been had
appearing to the Court now here that the
the said defendant Valentine Doub, late
ounty of Marin, of the property described in
herein was and is fraudulent and void, and
user thereat took nothing by his bid or pur-
at the deed of said property executed and
e said defendant Valentine Doub, as Sheriff,
ant Edward F. Stone was and is hereby de-
ll and void, and nothing has been conveyed
ne same is set aside and canceled; and it is
d and decreed that the costs of said sale—
of \$1,811.78—paid to the defendant Valen-

tine Doub, late Sheriff as aforesaid, are not and be no lien upon said property; and it is further ordered that plaintiffs herein recover their costs and disbursements of or from the defendants Edward F. Stone and Valentine Doub, late Sheriff, and that they do not recover costs or disbursements of or from the other defendants; that the parties to this action have twenty days from the entry of this order to move this Court in reference to a sale of said property under the decree heretofore made therefor; and let a finding of fact and decree be drawn in conformity with the facts and the opinion of this Court hereafter to be filed herein, and the same to be submitted to the Judge for settlement."

After the making of this order negotiations were entered into between the defendant Throckmorton and Stone looking to a compromise, and a settlement was effected. In speaking of this compromise, Stone testified: "The settlement with Mr. Throckmorton was a compromise. It was in the early part of 1865. I do not remember a suit brought by Throckmorton to set aside the Sheriff's sale to me under the Ricketson mortgage. Judge Dwinelle decided that the ranch should be sold in divisions instead of being sold as a whole, as it was sold by the Sheriff. I do not remember the exact time the decision was rendered, but it could not have been a great while before the compromise. The compromise was effected before the decision of Judge Dwinelle. The terms of the compromise were that I should turn over to Mr. Throckmorton the entire interest that I had in connection with the Saucelito Rancho, or against either—something connected with the Alameda Rancho, I believe. The consideration was \$45,000. It included the Black mortgage, too, for which I paid \$10,000 in gold—\$15,000 in greenbacks—worth \$10,000 in gold at that time. It also included all title I acquired in a sale and a judgment rendered in one of the District Courts in San Francisco in favor of Robert S. Watson against Mr. Throckmorton. At the time of the sale it amounted to somewhere in the neighborhood of \$7,000 or \$8,000. Under the Watson judgment the entire interest of Mr. Throckmorton in Saucelito Rancho was sold, and I became the purchaser of the Sheriff's deed. That was all included in the compromise."

Pursuant to this compromise, Stone, on the 25th of January, 1865, executed to the defendant Throckmorton a deed for the property mentioned in the Sheriff's deed, made by him under the foreclosure sale, and on the 7th of March, 1865, there was entered in the minute book of the said thirteenth District Court, in the aforesaid cause of *Throckmorton*

ne et al., the following: "And now, on this parties, plaintiffs and defendants, by their re-ry of record, and by their stipulation en-en Court, consented to vacate the order set-le mentioned in the complaint, and direct-that effect, entered herein on the 12th day p. 1864, and to a dismissal of this suit. It dered, adjudged and decreed that the said t, and every part thereof be vacated and set this suit be, and the same is hereby dis-

thousand dollars paid by Throckmorton to g the compromise was obtained by Throck-ating his promissory note therefor and sent by mortgaging the Saucelito Rancho; and ousand dollars so paid Stone was a settle- the Ricketson and Black mortgages, but son judgment against Throckmorton indi- about the time of the settlement with Stone, throckmorton executed other mortgages upon ncho, upon which he attained the additional ousand dollars, with which he discharged edness of said William A. Richardson.

August, 1868, the defendant Throckmorton, covenant of February 9, 1856, conveyed the illiam A. Richardson to Stephen Richardson aria Antonia Richardson.

f March, 1857, Stephen Richardson, Manuel ana Torres conveyed all their interests in, r, the covenant of February 9, 1856, to one ling, who, subsequently on the 9th of De- onveyed all of his interests therein to Horace he 6th of October, 1862, Janes died intest- ty and County of San Francisco, leaving s his heirs-at-law and next of kin the plain- on. On the 8th of October, 1862, Charles s duly appointed administrator of the estate P. Janes, deceased, in and by the Probate ty and county. On the 10th of January, filed in said Court an inventory of the prop- ate, after the same had been appraised, in there was set down as personal estate the Horace P. Janes, deceased, in the aforesaid ebruary 9, 1856, said interest being ap- ollars. On the 2d of February, 1863, upon he Probate Court directed the administrator

to sell all of the personal property of said estate at public auction. Under this order, the administrator on the 18th May, 1864, made a sale at public auction of all the right title and interest of the estate of said Horace P. Janes, deceased, in and to the said covenant of February 9, 1856, the said Edward F. Stone for the sum of one hundred and twenty dollars, which amount Stone paid the administrator. The sale having been reported to the Probate Court, the Court, on the 30th day of May, 1864, made an order approving the said sale, and thereupon and on the same day the administrator executed to Stone a bill of sale of Janes' right under the covenant. On the 25th of February, 1865, and at the same time of the execution of the deed hereinbefore mentioned, Stone conveyed to defendant, Throckmorton, whatever interest in the covenant, if any, he obtained under the administrator's sale.

The Court below found as a fact that the defendant, Throckmorton, in making the negotiation with and in taking the deed from Stone, "acted for himself individually, with the intention to acquire the property for himself, and at the same time to extinguish all possible liability of his on account of and under the said agreement of February 9, 1856. That his purchase was openly made and was well known at the time, and that he made the purchase for his own benefit, and from thence hitherto, he has had the actual, exclusive, open, notorious and continuous possession of said property, claiming the same adversely to all the world, which has all along been of general notoriety." That the only sales made by the defendant of the property was a sale made to the United States Government, in 1867, of "Lime Point," so-called, and a sale of about 880 acres of the Saucelito Ranch made to J. Thompson and others in the year 1868, the aggregate of two sales amounting to the sum of three hundred and ninety thousand dollars; and at the time of the commencement of this action about sixteen thousand acres of the Saucelito Ranch remained unsold and undisposed of.

The Court further found as a fact that "after the delivery of the Sheriff's deed to said Edward F. Stone in December, 1863, all parties claiming under the said Wm. A. Richardson abandoned all efforts and attempts to prevent the consummation of the sale of the Saucelito Ranch property, and with reference to the Albion Ranch and the San Diego property the same were regarded as of no considerable value;" and this finding is in direct conflict with the record evidence which shows, as already stated, that long after the making of the Sheriff's deed, to wit, on the twelfth of December

adant, Throckmorton, together with Maria A. Stephen Richardson, Manuel Torres, Mariana Manuel Torres as executor of the estate of Wm. deceased, and others, in an action brought, and after trial thereof, obtained an order of District Court declaring the sale to Stone void and directing judgment accordingly, and a compromise of the controversy was effected by the execution of the deed from Stone to the defendant Throckmorton. The Court below further found as the plaintiff's had actual notice of the said purchase by Edward F. Stone by defendant Throckmorton at the time it was made, and that he claimed to himself and in denial of any right of the plaintiff's, about the time of the commencement of this action the said Polhemus, administrator of the estate of these plaintiff's, after the time of the said sale to said Stone of the agreement of February set up or made any claim under or by virtue of the agreement to any interest in the real property or to the proceeds thereof." This finding was not sustained by the evidence. After a careful examination of the record we find no evidence tending to show that the plaintiff's ever at any time prior to the filing of the demand on the defendant just before completion, in 1875, had any notice that defendant Throckmorton made what the Court terms the "purchase" of the real property for himself and in denial of any right of plaintiff's to three of the four plaintiff's they are still claiming as of the date of the deed—February 25, 1865—more than a few very tender years. The evidence fails to show any repudiation of the trust by the defendant Throckmorton if there was a trust, ever was made known to the plaintiff's or to either of the plaintiff's, or to the estate of Janes or to either of the plaintiff's, at the time of the demand and refusal in 1875. Lucy H. Janes, is the widow of Horace P. Janes, deceased, and on the fifth of March, 1875, was duly appointed guardian of the other plaintiff's, who are minor children of Horace P. Janes.

On the twenty-second of May, 1875, plaintiff's commenced an action against the defendant Throckmorton for having him adjudged the trustee of plaintiff's in and to a part of all money proceeds of sales of the real property on hand, and of the undivided one-fifth part of the remaining unsold, after deducting the amount of the indebtedness of William A. Richardson and the ex-

penses attending the sale of the land and the settlement of the indebtedness; and to compel defendant to account and pay to plaintiffs the one-fifth part of such proceeds and to convey to them the one-fifth part of the remaining lands.

Several defenses are relied upon to defeat the action. It is contended on behalf of the defendant, first, that the covenant of February 9, 1856, was a personal covenant pure and simple, providing for no interests in real estate, and that no trust respecting the lands thereby arose; second, that conceded that the covenant of February 9, 1856, gave an interest in real estate, and that defendant held the property in trust to the extent therein mentioned, still that by the deed from Stone he got a perfect title, discharged of all trust, and, further, that in no event can he, under the pleadings in this case, be charged with any trust in respect to the conveyance from Stone; third, that if the action could be maintained at all, it could only be by the administrator of the estate of Horace B. Janes, deceased, and that in no event can his heirs maintain it, and, fourth, that the action is barred by the Statute of Limitations. We will consider the defenses in the order in which they have been stated.

1. The deed and covenant of February 9, 1856, were parts of the same transaction, and must be considered together, in the light of the circumstances that are shown to have existed at the time. Thus considered it appears that William A. Richardson was then the owner of a large amount of land which was heavily encumbered. In order to pay his debts and to save a homestead for himself and something for his children, if possible, he entered into the arrangement with the defendant Throckmorton, culminating in the execution of the deed and covenant. By the deed the legal title to the property was conveyed to Throckmorton, not, as said in the brief of defendant's counsel, absolutely and without conditions, but upon the conditions and for the purposes stated in the contemporaneous covenant—in substance, as we construe the covenant, as follows: That Throckmorton should sell as much of the lands conveyed to him as he should deem necessary to discharge all of the indebtedness of William A. Richardson, and if, after the discharge of such indebtedness and the payment of the expenses incident thereto, any money remained from the proceeds of the sale, he would pay over to Stephen Richardson and Maria A. Torres the one-fifth part of it; and, in the event he did not sell all of the lands, he would, after discharging the debt and paying the expenses incident to doing so, convey to Stephen Richardson for the use of Maria A. Richards

said William A. Richardson, the homestead (to reserve from sale, if possible,) upon which Richardson then resided, and to Stephen Rich-
Mariana Torres, the undivided one-fifth part of remaining unsold. We do not consider the which Throckmorton agreed to sell the lands— years—of the essence of the contract or ma-
disposition of the case. The general rule of time is not of the essence of the contract, and
nothing in the present case to take it out of this Throckmorton accepted the conveyance of the
he conditions and for the purpose already
expressly limited his liability to the amount of which he should realize from the sale and dis-
e property.

words, he assumed no personal liability for debts, but was to devote to the matter his time, in consideration of which he was to re-
s of all the moneys and four-fifths of all the (the homestead) he could save, after discharging
ess of William A. Richardson. That Throck-
cepting the conveyance of the lands upon the
d for the purposes stated in the covenant, as-
relations with the beneficiaries, and, to the ex-
ghts reserved to them by the covenant, there-
their trustee, we think very clear. In *Sey-*
r, 8 Wall. 202—a case very similar in principle
at—the Supreme Court of the United States
st is where there are rights, titles and interests
distinct from the legal ownership. In such
al title, in the eye of the law, carries with it,
absolute dominion; but behind it lie benefi-
l interests in the same property belonging to
ese rights, to the extent to which they exist, are
the property, and constitute an equity which
quity will protect and enforce whenever its aid
pose is properly invoked. Interests in real
contingent, may be made the subjects of con-
quitable cognizance, as between the proper
object of the trust here was to sell the prop-
time limited, and, after deducting from the
outlay, with interest and taxes, to pay over to
of the residue. To this extent, Seymour was
Price the *cestui trust*. They had a joint in-
property. Seymour held the legal title, but
Price were as valid in equity as those of Sey-

mour were at law." (See also, *Hearst vs. Pujol*, 44 Cal. 230; *Watts vs. Ball*, 1 P. Wms. 108.)

But the doctrine of equitable conversion is invoked by the defendant, and, it is said, that as to the beneficiaries, the land under the agreement became personal estate, and the interest personal property. *Dodge vs. Pond*, 23 N. Y. 6; *Lynn vs. Gephart*, 27 Md. 547, and 2 Story's Eq. Juris. Sec. 1,214, are cited by defendant's counsel in support of the position. In *Lynn vs. Gephart*, the Court cites the section from Story, which reads thus: "The inclination of Courts of equity upon this branch of jurisprudence is not general to change the quality of the property, unless there is some clear intention or act by which a definite character, either as money or as land, has been unequivocally fixed upon it throughout," and adds that "if this intention does not clearly appear, the property retains its original character."

Dodge vs. Pond was a case where a testamentary disposition was involved, and it was held that where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative.

In *White vs. Howard*, 46 N. Y. 162, the Court say: "To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell it in any event. Such conversion rests upon the principle, that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result." And in *Bleight vs. The Manufacturers' and Mechanics' Bank*, 10 P. St. 132, it is said: "In order to change real into personal estate, it is essential that the direction to convert be positive and explicit; that the will, if it be by will, or the deed, if by contract, decisively fix upon the land the quality of money. *Symons vs. Rutter*, 2 Vt. 227; *Walker vs. Denne*, Ves. Jr. 170-185. But this characteristic nowhere appears. The deed is not imperative that the land shall be sold. It contains nothing more than a power to sell, leaving it discretionary with the trustee whether he will sell or not. In the deed, it is doubtful whether he had authority to sell, except in the contingency it was necessary to pay the annuity. To establish a conversion, a will or deed must direct a sale absolutely, or out and out for all purposes, irrespective of contingencies and independent of all discretion."

The most that can be claimed here is that Throckmorton had the discretion to sell all of the land; but so far from

ry upon him to do so, it was manifestly contingent upon a portion of it might be saved from sale. What is the character of the interest of Stephen and Mariana Torres under the covenant? That interest in the lands, we entertain no doubt. It is true—contingent on the exercise of Throckmorton to sell all of the land, and upon the sufficiency of the lands to pay the debts. But it was none the less an interest in the lands. In *Biggs vs. Bickett*, 12 Ohio 100, the testator conveyed his lands in fee to Hammond for the purpose of holding them, charged with the payment of the debts, and, after the expiration of one year from the death of the testator, upon the request of any one of the creditors named in the deed, Hammond was to promote the sale of so much of the land as should be necessary to pay the debts, and that upon the payment of the debts the residue thereof, should be reconveyed to the testator. In this case the trustee had the power to sell all of the land in order to pay the debts, and all of it might have been sold for that purpose; in which case, there would, of course, have been none to reconvey to Biggs. Biggs died before the land was sold, and the Supreme Court held that he had an equitable interest in the land, and that his estate was real estate and subject to sale as real estate in the Probate Court. (See also *Andrews vs. Hobson's Admr.* 100 Cal. 100; *Hobson vs. Fleet*, 14 Wend. 176.)

If counsel for defendant, it is said that "it is a question of the quality of this interest whether or not, prior to Janes' death, a judgment creditor could have sold it as real property on execution, and as to a purchaser." If that be a test, we think it probable that it could have been so levied on and sold. See *Wright vs. Nunan*, 52 Cal. 326; *Freeman on Exemptions*, 38; *Leroy vs. Dunkerly*, 54 Cal. 542.)

As we do, that defendant became a trustee under the deed and covenant of February 9, 1856, for Stephen and Mariana Torres, to the extent of the rights conveyed to them, and that their interest thereunder in the lands, it becomes necessary to inquire, what, if any, upon the rights of their successor in interest, P. Janes, was had by the Sheriff's sale under the decree of foreclosure of the Ricketson mortgage, the negotiation between defendant and Stone, the sale by Stone to defendant, the purported sale of the lands under the order of the Probate Court, and its effect as to the transfer by Stone to defendant?

It must be borne in mind that at the time of the conveyance of the property to Throckmorton and of the execution of the covenant, on the ninth of February, 1856, the Ricketson mortgage was about to be foreclosed, and the Bickerton mortgage had already been foreclosed and been ripened by a decree. It was for the very purpose of discharging the liens, and the other indebtedness of William A. Richardson, and of saving some part of the property, if possible, that the lands were conveyed to Throckmorton with the power to sell the same, etc. Throckmorton accepted the trust upon the conditions already stated. It was his duty to use his best exertion to sell the lands and discharge the liens. This he did, but he failed prior to the time of the sale under the foreclosure of the Ricketson mortgage. Nor did he cease his efforts to sell the property. After the Sheriff's certificate of sale had been issued to Stone (the purchaser at the foreclosure sale), Throckmorton, in connection with Torres, as executor of the estate of William A. Richardson, deceased, and others, commenced the action for the purpose of vacating and annulling the sale. In commencing and in prosecuting that action he was acting as trustee for in the complaint, which was signed and verified by Throckmorton himself, it is expressly declared that in giving the instructions to the Sheriff as to the manner in which he should sell the property under the decree in the Ricketson case, Throckmorton and Torres, as executor, were "acting in their own interest and on behalf of themselves and the other complainants"—two of whom were Stephen Richardson and Maria Torres; and the failure of the Sheriff to follow the instructions was one of the grounds relied on in the complaint entitling the complainants to the relief sought. As trustee Throckmorton commenced that action; as trustee he prosecuted it, and as trustee he obtained, on the twelfth day of December, 1864, the decision of the Court declaring the sale made to Stone fraudulent and void, and also declaring null and void the Sheriff's deed which had in the meantime been issued to Stone. In this condition of affairs the negotiation for a compromise was entered into between Throckmorton and Stone, resulting in the settlement by which Stone executed to Throckmorton a deed for all his interest in the property for the sum of forty-five thousand dollars. This settlement included the discharge of the Ricketson and Bickerton mortgages and also the Watson judgment against Throckmorton individually. In order to obtain the forty-five thousand dollars to effect this settlement, Throckmorton executed a promissory note therefor and secured its payment by a mortgage on the Saucelito Rancho. At the same time, he

the same way, namely, by executing his notes for their payment by mortgages on the Saucelito thousand dollars additional with which he set-charged the other indebtedness of William A. and after effecting the settlement with Stone, and the other parties to the suit against Stone, day of March, 1865, went into Court and, by con-parties, obtained an order vacating the order de, annulling the sale and deed, and caused dismissed. Under such circumstances how can Throckmorton was not acting as trustee? In was he acting when he borrowed the \$30,000 to discharge the indebtedness of William A. en held by Baron and others, if not as trustee? money was obtained at the same time, and in the at obtained with which to settle with Stone, executing his notes and securing their payment on the trust property. It was by virtue of the in pursuance of the trust, that he brought the Stone to annul the sale to him, and it was by trust only that he was in position to mortgage and obtain the money with which to effect the d, whatever his intentions may have been, the e interest thus acquired inures to the benefit of trust to the extent of their rights under the cove-vs. *Thornton*, 28 Me. 355; *Joor vs. Williams*, *Jewitt vs. Miller*, 18 N. Y. 402; *Morgan's Heirs*, 4 Monroe, 297; *Brantley vs. Kee*, 5 Jones' *atchfield vs. Haynes*, 14 Ala. 52; *Spindler vs.* d. 410; *Van Epps vs. Van Epps*, 9 Paige, 237; *is.*, Secs. 321, 322.) on that the plaintiffs should have alleged in their Stone transaction, and have asked that the by him to defendant be decreed to be held in tiffs, we think not well taken. Defendant, in ttlement with Stone, and in taking the con-him, did not commit a breach of his trust, but, y, was, as we have shown, acting in the line of trustee. The title he thus obtained, upon well les, enured to the benefit of his *cestuis que trust*, f their interests. The defense now asserted ver, that by that deed defendant obtained the ed of all trust, cannot be sustained by a Court or were the plaintiffs bound to anticipate that e would be made. It was sufficient for them to he original trust, which they did. That exist-

ing, the law declares the effect of the conveyance in question. To this it may be added that the plaintiffs' reply to this defense is, under our system, pleaded by operation of law (*Curtis vs. Sprague*, 49 Cal. 301.)

Having determined that under the agreement Stephen Richardson and Mariana Torres had an interest in the land and it being undisputed, that by various assignments, their interests were acquired by Horace P. Janes, and were vested in him at the time of his death, it follows that the attempted sale thereof by the administrator of the Janes estate passed no title. Real estate of a deceased person can only be sold in the mode provided by law. (*Haynes vs. Meeks*, 20 Cal. 288; *Townsend vs. Tallant*, 33 Cal. 45; *Woods vs. Monroe*, 1 Mich. 243.) The attempted sale of the Janes interest under the order of the Probate Court directing a sale of the personal property of the estate, and all proceedings thereunder were void.

3. Are plaintiffs the proper parties to bring this action? On the part of the defendant it is argued that the administrator of the estate of Janes alone can bring it. On the other side, it is contended that an administrator has no power except such as is expressly conferred by statute, and that the statute nowhere confers upon him the power to bring a suit, to enforce a trust or compel a conveyance of land. In *Chapman vs. Hollister*, 42 Cal. 463, it is said: "On the death of the ancestor his title to real estate passes to the heir or devisee subject, however, to the right of possession of the executor or administrator for the payment of debts. (Probate Act Sections 114, 194; *Becket vs. Selover*, 7 Cal. 213; *Meeks vs. Hahn*, 20 Cal. 627; *Matter of Estate of Woodworth*, 31 Cal. 604.)"

That the administrator is entitled to the possession of all the property of the estate, real and personal, during the administration, and can maintain an action for the recovery of the possession of all such property, is not denied by counsel for plaintiffs; but he urges, and we think correctly, that the statute does not confer upon him the power to compel a conveyance of the title to the property to himself.

The present action is brought to establish a trust and to compel defendant to convey the legal title to real estate to plaintiffs as heirs-at-law of Janes. On his death his title then at equity, passed to the heirs, as was held in the case last cited; and unless it can be maintained, which we think cannot be done, that the administrator is entitled, under our statutes, to have the title to the property conveyed to him, it would seem clear that he is not the proper party to bring this

Section 194 of the Probate Act (1581 C. C. P.) and of the same Act (1452 C. C. P.) tend very much to support this view. By the latter section it is " * * * the heirs or devisees may themselves, with the executor or administrator, maintain the possession of the real estate or for the quieting the title to the same against any one executor or administrator." And by Section 194 that for the purpose of bringing suit to quiet the possession of the administrator shall be deemed the heirs. Section 119 of the Probate Act applies to personal property.

Section 119 of the Code of Procedure answers the objection of the creditors of the estate of Janes. It is "The final settlement of an estate, as in this case, shall not prevent a subsequent issue of a writ of dower, or of administration, or of administration with will annexed, if other property of the estate be found, if it become necessary or proper for any reason, and a new order should be again issued."

It remains to consider the defense of the Statute of Limitations.

That this defense cannot avail the defendant is shown by the fact that the record fails to show that defendant's holding was ever made known to either of the parties. The administrator of the estate of Janes is *James vs. Platt*, 3 How. U. S. 411, the Supreme Court of the United States said: "Time begins to run against a trustee only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and is fully and unequivocally made known to the plaintiff." In *Hearst vs. Pujol*, 44 Cal. 235, it is said: "As between trustee and *cestui que trust*, in the absence of fraud; the Statute of Limitations does not run until the trustee repudiates the trust by clear acts or words, and claims thenceforth to be as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the plaintiff." (Perry on Trusts, Sections 863, 864.)

The old Probate Act has no application to a case of the present, where no sale of real estate was at any time made.

The claimant at which we have arrived works no wrong against the defendant. He is entitled to four-fifths of all the unsold property (the homestead), and to four-fifths of all the property he succeeded in saving, after deducting the indebtedness of William A. Richardson, and all

reasonable expenses incurred by him in the execution of his trust. It was for this that he stipulated to devote his services. Good conscience and fair dealing demand that he take nothing more, but surrender to the plaintiffs the portion that is theirs.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKee, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed March 18, 1881.]

No. 6631.

MCDONALD, APPELLANT, vs. McCONKY, RESPONDENT.

CONVERSION—DAMAGES—ATTORNEY'S FEES—PRACTICE. A complaint for conversion of personal property being, as to damages, in the words of the Code, with the addition of "attorney's fees." Held, That the latter may be rejected as surplusage, it not appearing that the jury included such fees in their verdict. An order dismissing a motion for a new trial is an order after judgment and appealable. Where there are two appeals, one from the judgment and one from an order denying a new trial is reversed, the Court below is not prevented from setting aside the verdict or findings for cause.

Appeal from the Third District Court, Alameda county.

McAllister & Bergin, for appellant.

Cope & Boyd and *M. B. Blake*, for respondent.

By the COURT:

Defendant filed an answer, and the relief granted to plaintiff by the judgment of the Court below was consistent with the case made by the complaint, and was embraced within the issues. (C. C. P., 580.) The allegation of damages in each Count of the complaint—with the exception of the word "attorney's fees"—is in the words of Section 3336 of the Civil Code. The words "attorney's fees" may be rejected as surplusage. The evidence is not before us, and it cannot be assumed that the jury included attorney's fees in the verdict. The judgment should be affirmed.

The order dismissing the motion for a new trial was an order "after judgment" and appealable, and the order was erroneous. (*Calderwood vs. Peyser*, 42 Cal. 113.)

Although there is but one transcript, there are two appeals before us—as distinct as if they had been separately noticed—one from the judgment, and the other from the order d

trial. It is hardly necessary to add that in such firmance of the judgment on direct appeal there- judgment roll, should not prevent the Court setting aside the verdict or findings (and the used thereon), if it should be satisfied that the new trial should be granted.

ment on direct appeal therefrom is affirmed. dismissing the motion for new trial is reversed, e remanded for further proceedings on the motion

DEPARTMENT No. 2.

[Filed March 18, 1881.]

No. 6653.

HONORA SHARP, APPELLANT,

vs.

MILLER, RESPONDENT.

STATUTE OF LIMITATIONS.—The Statute of Limitations, in an r maliciously suing out a writ of attachment, commences to the date of the levy.

om the Twenty-third District Court, of the City of San Francisco.

ising, for appellant.

ed, for respondent.

., delivered the opinion of the Court.

n was brought to recover damages for the ma- groundless suing out of a writ of attachment in a a third party, a levying it upon real estate be- and standing in the name of plaintiff. The was June 17, 1874, and this action was not within two years thereafter. The defendant a several grounds, among others that the cause s barred by the Statute of Limitations (Section sion 1, C. C. P.). Upon that ground the Court ned the demurrer, and plaintiff appealed. It is e complaint that plaintiff bargained the premises s, but that in consequence of the levy he refused, 1875, to complete the purchase; and that the ding until January 25, 1877, at which time judg- ndered against the plaintiff therein, who is the

defendant here; and it is urged that the statute did not commence to run until the final determination of that suit, or at least until Forbes' refusal to complete the purchase. Even granting (which we do not) that plaintiff ever had a cause of action, we are of opinion that the Statute of Limitations commenced to run June 17, 1874.

Judgment affirmed.

We concur: Morrison, C. J., Thornton, J.

In the District Court

OF THE THIRD JUDICIAL DISTRICT, IDAHO TERRITORY.

MAY TERM, A. D. 1880.

LORANNE B. MORGAN, PETITIONER,

vs.

J. N. IRELAND AND H. H. MIFFLIN, EXECUTORS.

Petitions to set aside a will.

MORGAN, J.:

In this case, Morgan M. Morgan, deceased, executed his last will and testament on the sixth day of August, A. D. 1878. His family then consisted of himself and four children. Provision was made in the will for the nurture and education of the children, and for an equal division of the property between the said children when the youngest should arrive at the age of twenty-one years.

On the thirteenth day of October, A. D. 1878, complainant intermarried with the deceased, and from that date she cohabited with him until his death, which occurred on the twenty-third day of February, 1879. On the third day of April, 1879, the said will was admitted to probate, and J. N. Ireland and H. H. Miffin, named in the will as executors were qualified as such, and letters testamentary were issued to them. No provision whatever was made in the will for the widow of deceased, and substantially no provision was made for her by the statutes of the Territory after the settlement of the estate.

There can be no question of the primary right of a person of sound mind to dispose of his own property as he shall deem proper. This right, however, is subject to the laws of his country and time. A man having made his last will

in due form of law, its provisions are to disposition of his property unless it is afterwards a revocation may happen in different ways, are revocations by the act of the testator limitations of law. Of the latter class of revocations which result from a total change in the of the testator such as is held by the Courts change in his intention as to the disposition of

have held that marriage and birth of a child the execution of the will, wife and child being r, would work a revocation. They have also birth of a child alone, after the making of the w amount to a revocation. They have held that a child or marriage will revoke, and finally alone will effect a revocation.

I think, be out of place to give in brief the s given by the Courts for this revocation.

s. *Roe*, 35 English Com. Law Reps. 457, marriage of a child subsequently to the execution of court held the will to be revoked, upon the provision was not made both for the wife and h in this case the widow and child had a small the large bulk of the property was demised to

re vs. Lancashire, 5 Term Reports, 49, Lord giving various instances of revocation, obthe foundation of all these implied revocations dition annexed to the will that the party does d that it should take effect, if there should be in the situation of his family."

orough, in *Kenebal vs. Scrafton*, 2 East. 530, proved of the above statement of the reason ion.

of *McCullom vs. McKinzie*, 26 Iowa, 510, the the will to be revoked by the birth of a child s as a reason that the birth of a child instantly duties and obligations, and worked such a estic relations as to properly and most reasonand sway his affections and conduct; and we may erate to presumptively change his intention in of his property as expressed in his will, and on as well as preponderance of authority repu- n that both marriage and birth of a child are to an implied revocation.

Appeal, 39 Penn. 119, it is said: "If the tes-

tator's circumstances be so altered, that new moral testamentary duties have occurred to him subsequently to the date of the will, such as may be presumed to have produced a change of intention, this will amount to an implied revocation, and the Court says this is now a legitimate element of our common law."

In *Negus vs. Negus*, 46 Iowa, 497, the Court says that "the birth of a child creates new duties and obligations, and legally operates to presumptively change his intention in the disposition of property as expressed in his will, and held that the birth of a child alone will revoke a will even when the former children had been disinherited by it."

In *Fallon vs. Chidester*, 46 Iowa, 588 (26 American Reports 164), the Court says that "a will not providing for children subsequently to be born is revoked in law by the subsequent birth of a child, in spite of a statute to the contrary—that a statute providing what should alone revoke a will."

In the case of *Tyler vs. Tyler*, 19 Illinois, 151, testatrix made a will in 1843, married complainant in 1842, and died in 1855, leaving no children. The widow was unprovided for in the will. By the statute, however, she would inherit her dower interest in the lands notwithstanding the will. That at that time under Illinois statutes would be a life estate in one-third of the real estate. In this case it is said that when the wife is heir to the husband, and husband is heir to the wife, marriage subsequently to the making of the will works a revocation when the wife is not provided for in the will. This case is also put upon the ground that there was an entire change in circumstances creating new moral duties.

In the case *In re Tuller*, 79 Illinois, 99, the above case *Tyler vs. Tyler* was discussed, and the principle there announced was reaffirmed and approved, although the case was decided against the complainant on the ground that the husband would inherit nothing if the will was revoked.

In the case of *Tyler vs. Tyler* the wife would have had her dower if the will had been sustained; if revoked, she took one-half of the estate.

In the case at bar the widow would get nothing if the will is sustained; if set aside, she gets one-third of the real estate.

To show the tendency of the Courts and the law-making power of the age, it may be stated that in England it has lately been enacted by statutes that subsequent marriage would revoke a will.

In *Edwards' appeal*, 46 Penn. 144, it was decided that under the statutes of the State, a subsequent marriage would revoke a will.

vs. *Hall*, 34 Penn. St. 483, it is held under that marriage revoked a will, if the wife is unpro-

s, by statute, the widow is now allowed to take will or take her inheritance under the statute, as if been made.

are, subsequent marriage alone revokes a will.

ia, also, a will is revoked by subsequent marriage.

territory, property exempt is set apart for the use

y during the settlement of the estate. If this is

nt for the support of the family, the Probate

thorized to make a reasonable allowance for the

family during the settlement of the estate only.

estate is settled, the executor has no authority by

nor by the will, to pay the widow a dollar. By

5,000 is to be placed in the bank for his children;

has no part or lot in it.

e estate is settled, which will or ought to be done

years from the death of the testator, the widow is

his will to desert the children of her husband, or

their bounty alone.

member of the family she has the right to breathe,

sleep, in the house to which she was taken by her

seriously contended that he married the woman

his widow, and that he died, with the deliberate

place her in this condition at his death?

it may be safely said that no reason has ever been

Court for the revocation of a will on account of

uent marriage and birth of a child, or birth of a

, or marriage alone, which does not force itself

ind of the Court as applicable to the present case.

not by the marriage a total change in the situation

ly? He by that act took upon himself new duties

ligations, both moral and legal.

riage, like the birth of a child, instantly created

and obligations, and worked such a change in the

relations as to properly and most reasonably influ-

way his affections and conduct and, I may add,

guage of the Court in the case of *McCullom* vs.

'legally operate to presumptively change his in-

the disposition of his property as expressed in his

ator's circumstances were so altered by the mar-

new moral testamentary duties accrued to him,

such as may be conclusively presumed to have produced a change of intention, which is held to amount to an implied revocation.

There is another aspect of this case as of others of a similar kind, which, it seems to me, has not been quite stated in any of the cases referred to; that is, by the marriage the husband takes upon himself if the legal obligation to provide his wife with not only the necessities of life, such as proper shelter, food and clothing, and latterly it has been held that he is even obliged to furnish her with the so called luxuries suitable to his condition in life, and this obligation has been held to be a charge upon his property in innumerable decisions running back to a time whereof the memory of man runneth not to the contrary. Can it be reasonably said that this obligation ceases upon the death of the husband? I think it may be safely said that reason, precedent and the civilization of the age demand that this duty shall continue to some extent a legal charge upon the estate.

The Court has been cautioned by counsel for the defense to beware of breaking the stubborn glebe in new and untried soil. The Court carefully regards such suggestions, coming as they did from counsel of large experience and distinguished ability.

It has also been suggested that parties are at liberty to settle such matters by anti-nuptial contracts. I trust that the idea that parties about to enter into the relation of marriage should stop to higggle about a settlement or a share in property is thoroughly out of date. It is only worthy of a dark age, when marriages were contracted by parents and guardians without consulting the parties most interested, and wives were delivered as cattle were delivered upon contract.

I am myself fearful of innovations in the grand body of the common law, which is the crystallization of the combined genius of the bench and bar for ages. Courts are conservative; the law itself is conservative; but advancing civilization and education sometimes compel Courts and legislators to give a listening ear.

In this case, however, the reason of the law, which has been well said to be the soul of the law and the weight of authority in the Courts, seem to compel a decision in favor of the plaintiff.

I think the will must be held to be revoked and the letters testamentary canceled.

It is so ordered.

Coast Law Journal.

APRIL 9, 1881.

No. 7.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 29, 1881.]

No. 6768.

EDWARD DEADY, RESPONDENT,

vs.

TOWNSEND AND T. M. QUACKENBUSH,
APPELLANTS.

POINT DEMAND—DESCRIPTION—POINT NOT TAKEN IN LOWER COURT. An affidavit of demand indorsed upon the assessment war-
rant competent evidence of a demand for the assessment. An ob-
jection that "incidental expenses" were improperly charged in an
affidavit cannot be raised for the first time in an appellate Court.
An intention that certain streets be planked and the
corners thereof be reconstructed is a sufficient description of
what to be done.

from the District Court of the Fourth Judicial
District and County of San Francisco.

for respondent.

for appellants.

THE COURT, delivered the opinion of the Court:

Application to enforce a lien for work done in plank-
ing of McAllister and Polk streets, and for re-
cting the angular corners thereon. Plaintiff had
judgment from that judgment, as well as from the order
denying defendant's motion for a new trial, this
was executed.

Plaintiff urged for a reversal of the judgment of the
Court, that the proof of demand was insufficient.
The question has recently been passed upon by this
Court in the case of *Dyer vs. Brogan* (No. 6629), and we see
no departure from the ruling in that case. We there

held that the affidavit of demand indorsed upon the warrant was competent evidence of such demand, and that the affidavit was sufficient in form. The affidavit in this case is substantially the same as that in the case referred to, and we are of opinion that it was sufficient.

The second point raised on this appeal is, that the assessment was in fact illegal, as it included incidental expenses to wit, "An item for printing and a charge for engineering."

In subdivision fifth of Section 24 (Act of April 1, 1872) the term "incidental expenses" is defined as the "expenses of printing, measuring and advertising the work done under contracts for grading." This was not a contract for "grading," but, as has already been observed, was one for "planing," and therefore the items for incidental expenses were improperly included in the assessment. But no objection was made to the assessment in the Court below on this ground, and the objection is first made upon this appeal. We think it comes too late. It is, therefore, not necessary for us to decide whether the objection could have been considered if it had been properly made on the trial of the cause.

The third and last point is, that the resolution of intention did not describe the work with sufficient certainty. The resolution was, "that the crossing of McAllister and Polk streets be planked, and that the angular corners thereof be reconstructed." In the case of *Emery vs. San Francisco Company*, 28 Cal. 376, the notice of intention was to "grade and macadamize," and this was held a sufficient description of the work; and in the case of *Harney vs. Heller*, 47 Cal. 100, the Court say that a resolution of intention to "construct brick sewer with manhole and cover," is sufficient. In this case it is said: "This description is imperfect; but so will any description be, short of one containing a complete set of plans and specifications. It is evident, however, that the law does not require the description to contain a plan and specifications, for, at a later stage in the proceedings, the Board is authorized to call upon the Superintendent of Streets to furnish plans, specifications and careful estimates." The meaning of the resolution is, that the angular corners formed by the crossing of the two streets (McAllister and Polk) are to be reconstructed in accordance with plans and specifications to be prepared by the Superintendent of Public Streets, and we are of the opinion that the resolution of intention was sufficiently certain.

The judgment and order appealed from are affirmed. We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed March 23, 1881.]

No. 6878.

CARROLL, RESPONDENT,

vs.

STORCK & BROMER, APPELLANT.

COURT—PRACTICE—MISJOINDER. Defendants were sued for and delivered. Bromer suffered default. At the trial plaintiff produced his book the account of Storck & Co., and testified that he delivered the goods to Storck. On cross-examination he testified that he did not sell the goods in person. Defendant moved to set aside the plaintiff's testimony "as mere hearsay," but did not object to the use of the account as a mode of proving the contents of the writing. The court refused to set aside the account, showing that the account of Storck & Co. was read to the jury, it was incumbent upon appellant, if injured by its reading, to object to the account by a bill of exceptions. It was held that a bill—a transcript from the account—was presented to the jury, who did not dispute its correctness, but only asked for a ruling, that such testimony not only tended to prove a sale and delivery of the goods charged to Storck & Co., but created a conflict in the evidence. A misjoinder of parties does not appear on the face of the complaint, must be taken advantage of by answer.

in the District Court.

rien, for respondent.

enden, for appellant.

COURT:

Plaintiff, as a witness (having before him one of his books at the page on which was entered an account of Storck & Co.), testified that he sold and delivered the therein mentioned to defendant Storck amounting to which there remained due a balance of \$396.99. On cross-examination it appeared expressly that the witness never delivered none of the goods in person. Whereupon (appellant) moved to strike out all testimony as to the sale and delivery of the goods "as mere hearsay." Defendant moved to set aside the account, but did not pretend to allege that he sold and delivered the goods personally. The question put to him by the court was: "Will you be kind enough to look at that book and state—?" The witness had gone upon the books of account and opened the same at the account, showing charged to Charles L. Storck with a bill of goods as hereinafter testified to." It is held that he read from the book, or, at most, gave the jury the account, as the same appeared in the book.

Strictly this was objectionable as a mode of proving the contents of the writing, but this precise objection was not taken when the motion to strike out was made. If the precise objection had been made, the error could not have injured defendant, since, as the case shows, the very account was read to the jury. If the statement of the account given by the witness while he had it spread before him was incorrect, appellant could have shown it by having the account set out in the bill of exceptions. The case also shows that a bill—a transcript from the account—was presented for payment to the defendant Storek, who did not dispute its correctness, but only asked for time, etc. Two witnesses testify to this fact. The evidence certainly tended not only to prove the sale and delivery to Storek of the goods charged to Storek & Co., but created a substantial conflict in the evidence on that subject. There is no answer alleging a misjoinder of parties defendant. Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed March 23, 1881.]

No. 6811.

COBURN, RESPONDENT, VS. PEARSON ET AL., APPELLANTS.

PLEADING—ATTACHMENT—UNDERTAKING. In an action upon an undertaking given to prevent the levy of an attachment, the consideration for which the undertaking was executed and delivered must be alleged and proved: *Held*, accordingly, that a complaint stating that the Sheriff proceeded to levy upon and attach personal property, and before the completion of the levy, defendants, for the purpose of preventing the levy, or the completion thereof, gave the undertaking which was duly taken and accepted by the Sheriff; but containing no averment that the levy was not completed, or that the Sheriff proceeded no further therewith, was insufficient.

Appeal from the Twelfth District Court, San Mateo County.

Fox & Ross, for respondent.

Greathouse & Blanding and *E. Lynch*, for appellants.

McKINSTRY, J., delivered the opinion of the Court:

The action is brought upon an undertaking to prevent the levy of an attachment. The complaint alleges:

"Under, pursuant to, and by virtue of said writ of attachment, the Sheriff of said county of San Mateo did proceed to levy upon and attach certain personal property of said defendant in said writ, James Smart, situate in said county

completion of said writ—to-wit, upon the first of the said defendants, for the purpose of preventing such attachment, or the completion thereof, and Sheriff the undertaking required by law, with its sureties, etc., which said undertaking was accepted by said Sheriff."

that the words "did proceed to levy upon," necessarily imply that the Sheriff took the property in possession (and any acts clearly indicating his subjecting it to his control would give the Sheriff possession as against the defendant in attachment), and that it contains no averment that the Sheriff did not levy, or that he proceeded no further there-
would seem to be necessary. It is urged that the Sheriff duly took and accepted the undertaking, inasmuch as that it will be presumed that he did his duty, and that he would not have taken the property, and also the property. But such presumption, in proper cases, as a rule of evidence, not

A party must allege the material ultimate fact, although some other fact, if proven, might create a presumption of the existence of one of the facts alleged. There can be no doubt that the burthen was upon the plaintiff, at the trial, to prove the cessation of proceedings towards a levy, or a return of the property to the plaintiff, which a caption had been effected; otherwise the vacation of the undertaking (not under seal) would be sufficient.

vs. Melvin, 6 Cal. 651, it was held that a complaint for a writ of habeas corpus was defective because it did not aver that the property was delivered upon the delivery of the bond. The Court held it necessary to allege the consideration for the release, and a mere reference to the condition of the property was insufficient." The same rule is laid down in *Willatt*, 9 Cal. 500, where the Court says, further, "it is necessary to allege the release of the property may be made by general demurrer. In *Nickerson vs. Los Angeles*, 45 Cal. 568, it was held that in an action against a replevin bond it is necessary to allege that the property was delivered to the party for whom the bond was given. In *Los Angeles vs. Babcock*, 45 Cal. 252, that in an action on a bond the complaint must allege that the person released from custody; in *Jenner vs. Stroh*, 52 Cal. 52, that when action was commenced on an undertaking to procure the vacation of a default judgment,

the complaint should have averred that the judgment was set aside.

These cases, differing in particulars from each other and from the case at bar, all go to the point that in actions like the present, the consideration for which the undertaking was executed and delivered must be alleged and proved.

Judgment reversed and cause remanded, with direction to the Court below to sustain the demurrer to the complaint.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

Filed March 23, 1881.

No. 6652.

HACKETT, ADMINISTRATOR, RESPONDENT,
vs.

THE BANK OF CALIFORNIA, APPELLANT.

AMENDED COMPLAINT—CHANGING FORM OF ACTION. An amended complaint which changes the proceeding from an action *ex delicto* to an action *ex contractu*, is not permissible.

If allegations of a complaint are improved in their general scope and meaning, and not in some particular or particulars, it is error to allow an amended complaint to be filed.

Appeal from Nineteenth District Court, City and County of San Francisco.

Geo. W. Tyler, for respondent.

Lloyd & Newlands and Wilson & Wilson, for appellant.

By the COURT:

The Court below erred in allowing the plaintiff to file the second amended complaint, which changed the proceeding from an action *ex delicto* to an action *ex contractu*. (*Ramirez vs. Murray*, 5 Cal. 222.) Section 473 of the Code of Civil Procedure, except in certain particulars which do not affect the question, is like Section 68 of the former Practice Act as the same was amended in 1853, and as the same stood when *Ramirez vs. Murray* was decided.

The amendment was not permissible under Section 473 C. C. P., because here the allegations "to which the proceeding was directed" were unproved, "not in some particular or particulars only, but in their general scope and meaning."

The non-suit should have been granted.

Judgment and order reversed, and cause remanded for further proceedings.

DEPARTMENT No. 1.

[Filed March 23, 1881.]

No. 6096.

PANCOAST, RESPONDENT,

VS.

PANCOAST, APPELLANT.

COMMUNITY PROPERTY. A mere intruder into the possession of mines no property in the land as against the owner. A party intruded himself into the possession of land, the owner of consideration of a release of a portion, executed a conveyance of the remaining part: *Held*, that the property acquired by defendant was under the conveyance in fee. The defendant being married at the time of the intrusion, but married at the date of the conveyance in fee: *Held*, that the property acquired by defendant was community property.

from the Nineteenth District Court of the City and County of San Francisco.

Tyler, for respondent.

Evanson, for appellant.

Justice, J., delivered the following opinion:

In 1852 defendant without right intruded upon the land of the owners of the Peralta Rancho, a part of the Peralta Rancho, of a tract of 160 acres, of a portion of which he continued to hold the possession until after his marriage with plaintiff. After such marriage defendant "renewed" the ownership of the land under the Peralta title all the land of which he had retained possession. He surrendered the possession of such part, and, in such release and surrender, the owners conveyed the fee to the remainder of the land of which he had possession.

The question to be considered is whether the land, so far as the owners thereof to defendant, is the separate property of defendant or is the property of the marriage.

Defendant had no estate, legal or equitable, in the lands "leased" to the owners of the Peralta title. It is a question of possession of lands may, under some circumstances, constitute property. But, as between the sole owner of a tract, and one who has intruded himself into the possession without right, how can the latter be said to have property in the lands?" The owners who con-

veyed to the defendant their title may have been induced to make the conveyance to save themselves the annoyance and expense of litigation—which, however, could only have resulted in a judgment in their favor. The interchange of deeds did not necessarily involve a recognition, by the owners of both tracts of land, of any estate in defendant. The ability of defendant to give trouble and cause expense to those who held the Peralta title, by withholding from them the possession for a time, at the cost of a judgment against him for restitution (including costs of suit, and, perhaps mesne profits,) cannot be termed property in any legal sense.

This is not the case of separate property, acquired by one of the parties to the marriage contract, prior to the marriage, and which has simply changed its form after marriage. Defendant had no right in or to the land before his marriage.—his tortious possession could give him none after marriage.

It follows that the land conveyed to the defendant after the marriage was community property.

Judgment affirmed.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed March 17, 1881.]

No. 6385.

WEDEKIND, APPELLANT, vs. CRAIG, RESPONDENT.

MINERAL LANDS.—IVANHOE MINING CO. vs. KEYSTONE CONSOLIDATED CO.—PRESENT TERM OF S. C. U. S. FOLLOWED. The grant of the 16th and 36th sections of public lands to the State of California, by the Act of March 3, 1853, was not intended to cover mineral lands, but such lands were excluded from that grant.

Appeal from the Fourteenth District Court of Placer County.

J. P. Dameron, for appellant.

Tuttle & Fulweiler, for respondent.

By the COURT:

The conclusion reached by Department No. 2, in this cause, is in accord with the judgment of the Supreme Court of the United States rendered at its present term in the case of the Ivanhoe Mining Co. vs. the Keystone Consolidated Mining Co. The opinion of the Department will therefore stand as the opinion of the Court in Bank.

IN BANK.

[Filed March 28, 1881.]

No. 6805.

MATTER OF THE ESTATE OF MARY KIDDER, DECEASED.

OBJECTION—PETITION—PLEADING—CONTEST.—An averment in a petition for the probate of a will that, at some time, deceased left a will in the possession of a party, is not an averment that deceased left a will at the time of her death. A will lost or destroyed after the death of the testatrix must be alleged and proven to have been in existence at the time of her death; if lost or destroyed before her death, it must be alleged and proven that it was fraudulently destroyed during her lifetime. A contestant is not called upon to meet any averment made by the petitioner for probate of a will, hence, findings in favor of the will will be disregarded.

APPEALS. Appeal from Probate Court, Santa Clara County.

Wm. H. Fisher, for appellant.
Wm. H. Fisher, for respondent.

The court delivered the opinion of the Court:

An appeal from an order of a Probate Court, admitting to probate a paper (or a lost paper) as the will of a deceased person. The petition alleges "that said deceased left a will in her possession on or about the second day of July, 1879, in the possession of Ira Stevens, which your petitioner alleges, and therefore alleges to be the last will and testament of said deceased, and which said will has been in the possession of said Stevens, and was not revoked by the said deceased, and which said will is in writing," etc. Objections were filed by the husband of deceased, and a trial was had to whether the objections presented any issues, and the trial was had, and findings were made upon the theory that the alleged will was offered in evidence, fraudulently destroyed in the lifetime of the deceased. The evidence showed, and the Court found, that the will was burned during her lifetime. No such case as presented in the petition. The case presented by the petition is that the deceased left a will in the possession of Ira Stevens; that it has been lost or destroyed, and that it is in writing. Averring that at some time she left a will in the possession of Stevens does not aver that she left a will at the time of her decease, in May, 1879. If the will was lost or destroyed after her death, it must be alleged and

cover possession of the real property, without a foreclosure and sale." (C. C. P., Sec. 744). It has been held, and doubtless the law, that parol evidence may be introduced for the purpose of showing that a deed absolute upon its face was intended as a mortgage—not for the purpose of contradicting the written instrument, but to establish an equity superior to its terms. (*Pierce vs. Robinson*, 13 Cal. 11). But even a mortgage may contain a power of sale. Section 2,932 of the Civil Code, is as follows: "A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." (See *Cormerais vs. Genella*, 22 Cal. 124-5).

It is unnecessary, however, to pursue this line of reasoning any further, because the instrument executed by Bankman to secure the repayment of the money borrowed by him from the Savings and Loan Society, was not a mortgage, but was in fact a deed of trust. The learned counsel for appellants has argued with much zeal and apparent candor that there is no distinction in a case like this (where the instrument was simply to secure a debt) between a mortgage and a deed of trust. But the Supreme Court of this State has in several cases, recognized a distinction between mortgages and deeds of trust. In the case of *Koch vs. Briggs*, 14 Cal. 457, the precise question was decided, and the distinction was pointed out. It was there held, that Section 260 of the Practice Act (Section 744 of the Code of Civil Procedure) had no application to a deed of trust. The distinction referred to in *Cormerais vs. Genella*, *supra*, and was again pointed out in the recent case of *Grant vs. Burr et al.*, Cal. 298. Mr. Justice McKinstry, speaking for the Court in that case, says: "The instrument annexed to the complaint and marked 'exhibit D,' is a deed of trust, which authorizes the trustees therein named to sell and convey the lands described in default upon the payment of the note and interest, and it is not a mortgage requiring judicial foreclosure. (*Koch vs. Briggs*, 14 Cal. 256). The doctrine of *Koch vs. Briggs* has never been overthrown by subsequent decisions."

These cases settle the law in this State, and, as we believe upon solid principles of justice and right. The deed of trust conveys the legal title. (Perry on Trusts, Section 305, 308). The contract is, that the party in whom the debtor has seen fit to vest the legal title may, in case default is made by him (the debtor), sell the property and transfer the legal title to the purchaser. Such is the meaning and

the contract, and there is nothing in such a
make invalid, neither is there any reason why its
ould not be carried out.

ication for an injunction was properly denied,
er appealed from must be affirmed. So ordered.
r: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed March 19, 1881.]

No. 6583.

OR, APPELLANT, VS. FLYNN, RESPONDENT.

ORDER OF COURT.

om the District Court of the Twelfth Judicial
y and County of San Francisco.

Ball and M. G. Cobb, for appellant.

Delaney and J. W. Winans, for respondents.

COURT:

ase it is ordered that the opinion and order
February, 18, 1881, be amended so that the para-
encing with the words "Credit the defendant,"
with the words "buildings not removed," shall
ows:

the defendant with the amount for which the
s sold to Wade—viz., \$5,650, also with the
d by him for necessary repairs, taxes and insur-
or buildings erected by him on the premises, if
is purchase from Wade. Charge to the defend-
ants received by him for rents, also the value of
occupation of such portions of the premises as
een occupied by defendant; balances to bear
the statutory rates, with annual rests; *provided*,
at the cost of buildings erected by defendant
ne only by the excess of the rents and use and
ver the cost of repairs, taxes and insurance, and
a charge upon the land; and if the cost of such
gs be greater than such excess, the defendant
e right to remove them within a proper time, to
he Court below, he being charged with the value
f the land occupied by such buildings, and with
l use of the remainder of the premises. In case
the repairs, taxes, insurance and rents of the
moved will not enter into the account."

DEPARTMENT No. 2.

[Filed March 25, 1881.]

No. 6918.

IN THE MATTER OF THE ESTATE OF DA
McCARTHY, DECEASED.

CONFLICT OF TESTIMONY—PRACTICE—OBJECTIONS. Where the evidence is conflicting, the decision of the Court below will not be disturbed, being objected that both witnesses to a will were not called and *Held*, on appeal, it not appearing that the witness not called was out of the county, of unsound mind, or dead; or that his appeal was not waived, the objection was not well taken: *Held*, further, an objection not taken in the Court below could not be raised in the appellate Court for the first time.

Appeal from Probate Court, San Francisco.

Francis J. Sullivan, for respondent.

Robert Ash, for appellant.

MYRICK, J., delivered the opinion of the Court:

The will of the deceased was admitted to probate. In the year the father of the deceased petitioned that the probate of the will be revoked. The issues raised on this petition were tried by the Court, and the prayer of the petition was denied. The petitioner moved for a new trial, which was denied, and this appeal was taken.

1. On the motion for a new trial, points were made as to the mental capacity of the deceased, as to whether the will was signed by him, or by any other person for him, in his presence and by his direction; as to whether the attesting witnesses signed in his presence and at his request; as to whether he declared the paper to be his will, and as to whether he was free from undue influence. All these matters were referred to the Court upon conflicting evidence. There was evidence favorable to the validity of the will upon each of these points. Therefore, the decision of the Court will not be disturbed.

2. Another point made by the appellant in this Court, not made in the Court below, is that it does not appear from the record that both the subscribing witnesses were called on the trial of the issues raised on the petition, under Code section 1315, C. C. P. The answer is, it does not appear that the witness not called was out of the county, or was of unsound mind, or was dead. Neither does it appear that the petitioner waived the calling of the witness. The sta-

ript that it contains "all the testimony offered" y with the fact that the Court might have re- of the death, insanity or absence of the wit- h the waiving by the petitioner of the calling of At the trial, so far as the transcript shows, no de in regard to this matter. It is too late to for the first time.

and order affirmed.

: Morrison, C. J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed March 25, 1881.]

No. 6634.

ROBINSON, RESPONDENT.

VS.

DIAMOND COAL COMPANY, APPELLANT.

MINING OPERATIONS—DELETERIOUS MATTER.—Defendant in its mine caused deleterious substances to be deposited in a creek, whereby the land of plaintiff was injured: *Held*, that it was liable in damages; *held*, further, that the evidence on the question of damages being conflicting, and the estimate of the damages not exceeding that of some of the witnesses, the finding in favor of defendant would not be disturbed.

from the Fifteenth District Court of Contra Costa

Id and *H. Mills*, for respondent.

Barnes, for appellant.

S. J., delivered the opinion of the Court:

By the evidence, introduced on the trial of this case, it appeared that the plaintiff was, at the time of the commencement of the action, and for a long time before had been, the owner of a tract of land on the margin of the San Joaquin River. That the defendant had been for several years prior to the commencement of this action, mining for coal about one-half mile distant from, and at an elevation of, 700 or 800 feet above the plaintiff's land. That Quercus Creek runs through the land in a deep gulch or ravine until it reaches the plaintiff's land and that the water of said creek, during rainy seasons, is discharged upon and spreads over a considerable portion of the plaintiff's land.

The evidence introduced by the plaintiff tended to prove that the defendant deposited in said creek, at or near its mine,

coal screenings, ashes and other substances, which, during the rainy seasons, were carried and distributed by the water in said creek upon the land of the plaintiff, and that the value of said land was thereby greatly depreciated.

If the plaintiff was entitled to recover upon this evidence the judgment of the Court below cannot be reversed on the grounds of insufficiency of the evidence to justify it, although the defendant introduced contradictory evidence. It is, however, claimed on behalf of the appellant that the plaintiff was not entitled to recover upon that evidence, which, it is said, only shows that the water charged with refuse matter descended upon the plaintiff's land in its natural course, and in obedience to the law of gravitation. If the evidence introduced by the plaintiff did not tend to prove anything beyond that, it failed to establish the defendant's liability for any damage which the plaintiff may have sustained by reason of the overflow of his land. But the plaintiff's evidence, as we view it, tends to prove another and very material fact, viz., that said refuse matter was the product of the defendant's mining operations, and was deposited in said creek through agencies controlled by the defendant. And that although it was not responsible for the inundation of the plaintiff's land by the water of said creek, it was responsible for the deposit of the deleterious substances with which said water was charged through its agency upon said land. This does not in any manner involve the question of the defendant's right to mine or prosecute any other legitimate business upon its premises. It would not be claimed that the defendant could convey and deposit refuse matter from its mine upon the plaintiff's land by means of carts or wagons without incurring liability for any damages which the plaintiff might suffer by reason thereof. And we know of no principle upon which it could be held that a person may escape liability by doing that indirectly which would render him liable if done directly.

Upon the question of damages the evidence was conflicting, and as the estimate of the Court did not exceed that of some of the witnesses, the finding upon that point cannot be disturbed by this Court.

There were some exceptions taken during the trial to the ruling of the Court which are not discussed in the appellant's brief. We are unable to discover any error in the ruling excepted to, and think that the judgment and order appealed from should be affirmed.

Judgment and order affirmed.

We concur: Myrick, J., Morrison, C. J., Thornton, J.

IN BANK.

[Filed March 29, 1881.]

No. 7072.

THE PEOPLE, APPELLANT,
VS.
HAGGIN, RESPONDENT.

ACTION—CORPORATION—ACTION IN NAME OF REAL PARTY IN
To an action upon an assessment for reclaiming swamp
ed lands, the defendant filed a general demurrer. The
ged being that proper publication of the petition for form-
mation District had not been made: that the petition had
roved by the Board of Supervisors, and that the action
ly brought in the name of the people: *Held*, that if proper
and approval had not been made, there was no legally
ration; if properly made, there was a corporation, and, it
party in interest, the action could not be brought in the
people.

the Sixteenth District Court, Kern County.

son & Houghton, for appellant.

& Haggin, for respondent.

delivered the opinion of the Court:

was brought to enforce the lien of an assess-
in lands alleged to have been made for their
The complaint was demurred to upon the
others, that it did not state facts sufficient to
se of action. The Court below sustained the
he plaintiff declining to amend, judgment was
defendants. From this judgment plaintiff

ment it was contended that the complaint was
averments as to the publication of the petition
ne Board of Supervisors of Kern County for
f a reclamation district, and as to the approval
by the Board just referred to. The averments
as follows:

after the said petition was published once a
d of more than four (4) weeks preceding the
fter mentioned, viz.: for a period beginning
y-second (22d) day of December, A. D. 1870,
the twenty-fifth (25th) day of February, A. D.
vilah *Weekly Courier*, a newspaper published
Havilah, in the said County of Kern; that at
ublication was going on, there was no news-

paper in said Kern County which was published oftene once a week; that immediately after said publication completed as aforesaid, to-wit: on the twenty-eighth day of February, A. D. 1871, the said petition was presented to the said Board of Supervisors, that is to say, was taken to their office and with the Clerk of said Board; and an affidavit of publication thereof in the usual form, made by the publisher of said newspaper, and showing that the said petition had been published in the manner hereinbefore set forth, was filed in the office of the said Board with the said petition and at the same time. That the said Board was not in session at that time, and was not in session after that time until the month of May following.

"That at the next term of said Board held after the publication of the petition was completed, as aforesaid, and the said petition and affidavit had been presented and filed as aforesaid, to wit, on the second day of May, 1871, the petition so presented and on file, came up for a hearing before the said Board at a regular meeting thereof, and the Board then and there heard the same, and upon hearing and consideration thereof, found the statement set forth in the petition to be correct and true, and that no land was properly included in or excepted from said district; and the said Board then and there made an order approving the petition, which order was signed by the President of the Board and attested by the Clerk thereof.

"That thereupon, to wit, on the third day of May, 1871, the said petition was recorded by the County Recorder in said Kern County, in a book which was kept in his office for the purpose of recording papers relating to reclamation of swamp and overflowed lands."

The petition referred to is the initial proceeding in forming a reclamation district. The statute under which the petition was presented to the Board of Supervisors is mentioned (which is the Act of March 28, 1868, Stats. 1867-8, 507), requires that the petition "shall be published for four weeks next preceding the hearing thereof before the Board of Supervisors, and that if the Board shall find at the hearing of the petition, that the statements therein set forth are correct, etc., they shall note their approval of the petition, which approval shall be signed by the President of the Board and attested by the Clerk." (Stats. 1867-8, 30-1, p. 515.)

It will be perceived from an examination of the averments of the complaint set forth above, that there is no allusion to the publication of the petition for four weeks next

The hearing is stated to have been had on of May, 1871, and the publication made for ning with the 22d of December, 1870, and 25th of February, 1871, and that there is an of averment, that the Board noted their ap- petition signed by the President of the Board y the Clerk.

ded that in consequence of the lack of the referred to, it does not appear from the com- reclamation district was ever formed, and he other proceedings alleged were illegal and regarded, inasmuch as it had no right to levy t which ought to be enforced.

o this it is contended on behalf of appellant ents of the complaint show that the Reclama- a corporation, and that the objections urged dent should not be regarded, for the reason ctions could only be availed of in a suit on eople of the State. To sustain this conten- *Davis*, 51 Cal. 402, and *The People vs. Recla-* 53 Id. 346, are cited.

st referred to in the complaint, and the mat- relation thereto, do not show it to be a corpor- on cannot be maintained, and the demurrer ustained.

ding it to be a corporation, can the action be the name of the People? The respondent e action cannot be thus maintained, and that been brought in the name of the corporation. he provisions of the statute under which this rmed, the duty was devolved on the District e county to proceed to collect the assessments ame delinquent. This officer was required to he same manner as is provided by law for the State and county taxes." (See Section 35 of Stats. 1867-8, p. 516).

was commenced under the Political Code. By of the Code, the duty to proceed to collect essments is devolved on the same officer. But that the District Attorney shall proceed nner as is provided by law for the collection ounty taxes, is omitted in the section of the just referred to. According to the provisions l Code which were in force when this action the assessments when collected were to be easurer of the county, and this latter officer

was required to place the same to the credit of the District (See Pol. Code, Sec. 3,466, also Sec. 3,456; see also Sec. 3,457 of the Act of 1868, Acts of 1868, p. 516). The money so collected to the County Treasurer is to be paid out only for the purposes of reclamation of the District. The law requires that every action must be prosecuted in the name of the party in interest. (Sec. 367, C. C. P.) There are some exceptions to this general rule mentioned in Section 369, C. C. P., to which we will hereafter refer.

Who is the real party in interest here? In our opinion it is manifestly the Reclamation District. The money collected by suit or paid by the persons assessed is to be placed to the credit of the District, and to be paid out for the purposes of reclamation of the District. It is assessed, collected and disbursed for the District—a district which we hold as a corporation is competent to sue.

In the county of Mendocino, (Lamar, 30 Cal. 628), the execution of a recognizance was held, properly brought in the name of the county, although the recognizance was made by the people of the State, on the ground that when the money was collected went to the relief of the county. The County Justice Shafter, in that case used the following language on the point referred to: "The action is properly brought in the name of the county. Where a defendant convicted in a criminal proceeding is unable to pay the costs, or when he is acquitted, the costs become a county charge, and fines and forfeitures, when collected in any Court in this State, are to be applied to the payment of the costs in which the fine was imposed, or in which the forfeiture was incurred; and after such costs have been paid the residue is directed to be paid to the County Treasurer of the county in which the Court is held (1 Hit. Dig., Arts. 2,266, 2,281, 2,282). The county has a direct interest in the collection of the amount due on the recognizance. If collected, the county will be relieved of the necessity of raising money for the payment of the costs by a resort to taxation; and, in the event of a surplus, the surplus will belong to it by force of the statute." (30 Cal. 629; see also *Mendocino County v. Morris*, 32 Cal. 148).

The exceptions above alluded to from the rule requiring an action to be prosecuted in the name of the real party in interest, are those of an executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, who, it is provided by Section 369, C. C. P., "may sue without joining with him the persons for whose benefit

prosecuted." The people are not expressly authorized to sue in this case.

opinion that the corporation—the Reclamation—the real party in interest within the rulings of the cited, and that the action should have been brought in the name of the District. We think this objection by a demurrer on the ground that the complaint states facts sufficient to constitute a cause of action (*Witt vs. Chandler*, 11 How. Pr. 472). The facts of the complaint show no cause of action in favor of the plaintiff against defendant, and in such case the general rule is, the plaintiff having legal capacity to sue, to recover, if every fact averred is proved.

On the above given the judgment is affirmed.

Ross, J., McKinstry, J., Myrick, J., Sharp-
Lee, J.

DEPARTMENT No. 2.

[Filed March 31, 1881.]

No. 6858.

..., APPELLANTS, VS. RAPHAEL, RESPONDENT.

INSOLVENCY—PRACTICE—CONSTITUTIONAL LAW. Plaintiffs attorneys for defendant. The latter moved for a stay of proceedings on the ground that the levy of attachment commenced within two months of the filing of the petition for insolvency was void. Subsequently Hyams was appointed assignee in insolvency and moved on to dissolve the attachment, which motion was granted: the attachment having been dissolved by the operation of the law, the Court was correct in granting the motion, notwithstanding the assignee was not a party to the action and the motion had been denied the defendant, and no leave had been obtained to renew it. Section 6 of the Act of March 31, 1875, amending the insolvent law of 1852, is not unconstitutional, because the law was not re-enacted in full.

In the District Court of the Twelfth Judicial
and County of San Francisco.

Niedenrich & Ackerman, for appellants.

Lowenthul, for respondent.

Delivered the opinion of the Court:

Commenced an action against defendant, and obtained a writ of attachment, by virtue of which personal property of the defendant was seized August 14, 1879. On September, 1879, defendant moved the Court for

an order staying proceedings, on the ground that since commencement of the action defendant had filed his petition in the County Court, asking to be declared an insolvent debtor under the Act of May 4, 1852, and had obtained an order of the County Court to show cause and stay proceedings. On the twelfth of October, 1879, the Court below made an order that plaintiffs show cause why the attachment should not be dissolved. On the twenty-second of October, 1879, the Court denied the motion to dissolve the attachment on the ground that the affidavit in this case fails to show any adjudication had been made, and in its opinion notwithstanding short of an adjudication would dissolve an attachment. On the twenty-seventh of October, 1879, the County Court made its decree discharging the defendant from all his debts, which decree recited that, after proceedings thereto had been had, Hyams had been appointed assignee to receive the surrender of the property of said defendant, said Hyams thereupon moved the Court below that the attachment be dissolved, which motion was granted, and from the order therein made the plaintiffs appealed. Points are made as follows:

1. Hyams, being a stranger to the record, could not be permitted to make any motion in the case without becoming a party.

2. The motion, having been once made and denied, could not be renewed without leave of the Court.

3. The motion for discharge of attachment failed for want of the grounds of the motion.

4. If the motion was based on the discharge, the regularity of the proceedings should have been shown.

5. Section 6 of the Act of March 31, 1876, being supplementary to the Act of 1852, so far as it purports to dissolve an attachment in a case of voluntary bankruptcy is unconstitutional and void, because the law which is amended or revised by it is not re-enacted in full.

The transcript before us does not show that either of the points was made in the Court below. But, even if they had been made, we see no error in the order dissolving the attachment. The record exhibits sufficient to show the regularity of the proceedings of the Court below. The Act of March 31, 1876, provides that all attachments upon the property of the debtor levied within two months before the filing of the petition are dissolved. The law dissolved the attachment, and it was entirely competent for the Court to direct its officers to release the property from its process. We see no objection as to the constitutionality of the Act of March 31, 1876. We are not prepared to say that if a subsec

changes or modifies an existing law, the subsequent is unconstitutional because the Act changed or not re-enacted and published at length as

med.

r: Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed March 23, 1881.]

No. 6601.

ESTATE OF POST.

. A guardian will be held responsible for funds of the estate without security.

from the Probate Court, City and County of San

hton, for guardian,

nettt and T. H. Merry, for Caroline M. Post, a

delivered the opinion of the Court:

nnis was appointed by the Probate Court of the County of San Francisco, guardian of the estate of Post, a minor, and as such guardian received moneys of his ward. The ward, after attaining her majority, required the guardian to render an account of his management to the proper Court; which he did. In his account the guardian claimed a credit of \$850, which he alleged was due to him by his sister, Mrs. Bean, on her promise to execute to him a promissory note for the amount, to be secured—as security for its payment—a mortgage on the land he contemplated buying with the money. Mrs. Bean refused to execute the note or mortgage. The ward contested this item in the account, and the Probate Court very properly sustained her objection. A loan was made without any security, and without taking any evidence of indebtedness. It is not necessary to cite authorities in support of the proposition that a guardian is responsible for the funds of his ward so

med.

r: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 30, 1881.]

No. 6620.

GONZALES, RESPONDENT, vs. BROAD, APPELLANT.

CONTRACT—REAL ESTATE BROKER. Defendant employed plaintiff to find purchaser for real property. Plaintiff was to receive for his service \$500. Within a reasonable time plaintiff brought to defendant purchaser who was willing to buy and pay the price. Defendant was satisfied with the purchaser and entered into an agreement to convey to him the land. The purchaser declined taking the property on account of the state of the title. *Held*, that plaintiff was entitled to recover—his right not depending on the validity of the title or the validity of a contract for the conveyance thereof between defendant and the purchaser.

Appeal from the Fourth District Court, San Francisco.

J. F. Sullivan, for respondent.

J. M. Seawall, for appellant.

Ross, J., delivered the opinion of the Court:

The findings—which we think entirely sustained by the evidence—show that on or about the first of September, 1877, the defendant employed the plaintiff, who was then a real estate broker, to find a purchaser for certain real property of the defendant. According to the agreement between plaintiff and defendant, the property was to be sold for \$18,000, and the plaintiff was to receive for his services in finding such purchaser the sum of \$500. Within a reasonable time after this contract the plaintiff brought to defendant a purchaser ready and willing to buy and pay for the property at the price named. Defendant was satisfied with the purchaser and entered into an agreement to convey to the latter the land. The proposed purchaser afterwards refused to take the property, solely because the defendant's title thereto was not satisfactory to him. Defendant having refused to pay the plaintiff for his services, the latter brought this action to recover the sum of \$500, for which amount the Court below rightly gave him judgment, with costs.

The plaintiff did all he was bound to do under his contract to entitle him to the remuneration agreed on. He procured a purchaser ready and willing to buy the property at the price for which the defendant proposed to sell it, which purchaser was acceptable to the defendant. The plaintiff could do no more. His right to compensation di

way depend, according to the contract, on the invalidity of the defendant's title to the property. The plaintiff authorized to make any contract with the purchaser on behalf of the defendant. That the contract was for defendant himself; and even if the sale was consummated because there was no binding contract between them, it was the fault of the defendant for which the plaintiff was in no manner responsible. (*Phelan v. Monnot*, 43 Cal. 311; *Middleton vs. Findla*, 25 Cal. 76; *Koch vs. Emmsley*, 3 Keys N. Y. 204; *Koch vs. Emmsley*, 1 S. 69.)

and order affirmed.

for: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed March 21, 1881.]

No. 7591.

DAVID HEWES, RESPONDENT,

VS.

THE MANUFACTURING COMPANY, APPELLANT.

TAKEN—PRACTICE. It appearing that on August 30, 1880, a writ of appeal was served on respondent, on September 4, 1880, an appeal was taken and on September 18, 1880, the notice of appeal was filed. *Held*, that the appeal was well taken, as the notice was filed subsequent to service and the undertaking was filed five days after service, though before the notice of appeal was

from the Fourth District Court, City and County of San Francisco.

& *Ells* for respondents.

for appellant.

Justice, C. J., delivered the opinion of the Court:

The court moves to dismiss the appeal in this case on the following facts:

On the sixth day of May, 1880, judgment in favor of plaintiff was rendered in the Superior Court of the city and county of San Francisco, and on the thirteenth day of August of the same year an order was made denying defendant's motion for a new trial. On the thirtieth day of August notice of appeal was served on the respondent, and on the eighteenth day of September the notice was filed

in the office of the Clerk of the Superior Court. On fourth day of September the undertaking required by Code was duly filed by the Clerk.

It is claimed, on behalf of the respondent, that the appeal was not taken in the manner required by law, and in support of this proposition the Court is referred to the case *Buckholder vs. Byers*, 10 Cal. 481, which holds that the filing of a notice of appeal must precede the filing of the undertaking, because until an appeal is taken there is nothing given effect to the undertaking. That decision was made when Section 337 of the Practice Act was in force, which provided that "the appeal shall be made by filing with the Clerk of the Court, with whom the judgment or order appealed from is entered, a notice, stating the appeal from same or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney," and under that section it was held that the filing of the notice of appeal must precede or be contemporaneous with the service of a copy thereof on the adverse party. *Buffendeau vs. Edmonson*, 24 Cal. 94; *Boston vs. Haynes*, 31 Cal. 107.

But the foregoing section of the Practice Act has been materially changed by the Code of Civil Procedure. The law in force at the time the proceedings in this case were had was Section 940, C. C. P., which provides that "an appeal is taken by filing with the Clerk of the Court from which the judgment or order appealed from is entered a notice, stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless, within five days after service of the notice of the appeal, an undertaking be filed or a deposit of money be made with the Clerk as hereinafter provided," etc.

It will be observed that the new section has changed the rule previously in force respecting appeals, and has rendered inapplicable the decisions above referred to. As the law now stands, the notice of appeal may be filed with the Clerk on a day subsequent to that upon which the service is made, upon the respondent or his attorney, and the undertaking may be filed before the notice of appeal is filed with the Clerk. It must be filed, however, within five days after service of the notice of appeal, and that was done in this case.

The motion to dismiss the appeal must be denied. So ordered.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed March 25, 1881.]

No. 6662.

E. WHITING, RESPONDENT,

VS.

J. B. TOWNSEND, APPELLANT.

ASSESSMENT LAW—COMPLAINT—RESOLUTION—DEMAND—UNDIVIDED
ESTS—INCREASE OF VALUE OF LOT. A complaint on a street
ment containing the facts provided by the Act of April 1, 1872,
ing to street improvements, is valid. A resolution of intention
bing the work, "except that portion required by law to be kept
er by the railroad company having tracks thereon," is certain in
ms as to the work intended by the Board of Supervisors to be

A demand of payment of the assessment on the premises,
the lot is assessed to unknown owners, is sufficient. The
on the warrant showing a demand is evidence of such demand.
nce that a lot assessed has not been increased in value by the
vement is not admissible. A specification of the particular
st of each owner in a lot assessed for a street improvement is
quired. The lot as a whole is liable for the entire assessment.

from Fourth District Court, City and County of
isisco.

Parker, for respondent.

townsend, for appellant.

ON, C. J., delivered the opinion of the Court:

tion was brought to enforce a lien for planking
reet from Tyler to McAllister (except that portion
y law to be kept in order by the railroad company
cks thereon), and for reconstructing the sidewalks
reet. Plaintiff had judgment in the Court below.
t moved for a new trial, which was denied, and
al is taken from the judgment, and also from the
ying the motion for a new trial.

st objection we will notice is to the sufficiency of
aint. The pleading on behalf of the plaintiff in
eeding is regulated by Section 13 of the Act of
872, and it is therein provided what facts the com-
st contain. The complaint in this case was suffi-
er that section of the statute, and must be so
y the Court. It is claimed that when the Legisla-
took to provide a rule of pleading for this class of
surped judicial functions, and the Act is, therefore,
e cannot concur in this conclusion. All the rules

of pleading in this State are prescribed by legislative Act. The Code of Civil Procedure determines what facts shall be stated in a complaint, and how they shall be stated; what objections may be taken by demurrer, and how they shall be taken; and if not taken, the Code provides that many, indeed nearly all, of the enumerated objections shall be waived. It is unnecessary to enlarge upon this point in this case. The matter of pleadings, it must be conceded, is a proper subject for legislative regulation.

The second point relates to the resolution of intention. It is claimed on behalf of the appellant that the words "except that portion required by law to be kept in order by the railroad company having tracks thereon" destroys the certainty as to the particular portion which the Board intended should be planked at the expense of the property owners. The statute imposes upon a railroad company having its track upon a street of a city, the obligation "to plank, pave, or macadamize the entire length of the street used by its track, between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and make good crossings." (Civil Code, 49.) This is the requirement of a general statute, of which the Court was required to take judicial notice, and of which every citizen is presumed conclusively to have knowledge. The meaning of the exception would not, therefore, have been rendered more certain if this provision of the Code had been incorporated in it. The rule "*certum est quod certum reddi potest*" is plainly applicable here.

The third point relates to the sufficiency of the demand. It is claimed that the demand was made upon a person who was only twelve or fifteen years of age, and that it should have been made upon an adult member of the family. The property in question was assessed to an unknown owner, and no personal demand was required. Section 11 of the Code provides that "whenever the persons so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as 'unknown' on the assessment, then the said contractor, or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed." The return upon the warrant shows that this was done, and that was held sufficient by the late Supreme Court. (*Himmelman vs. Hoadley*, 44 Cal. 21.)

The fourth objection is that it does not appear that Boyle, who made the demand, was the agent of the plaintiff. Boyle states positively, in his affidavit, that he was su-

here was no evidence on the trial to the con-

place, it is claimed that the Court below erred in evidence offered in behalf of the defendant, owned in whole or in part by him was not included by the work done upon the street. We are not aware of any principle of law upon which such evidence has been considered by the Court, and, in our opinion, the authorities referred to by the learned counsel for the defendant fails to establish the proposition contended for. The Act provides that the expenses incurred in the improvement should be assessed upon the lots and lands benefited thereon, each lot or portion of lot being separately assessed in proportion to its frontage, at a rate per foot of frontage the whole to cover the total expense of the work. This is, perhaps, the most uniform and the least objectionable method of assessing the property that could be adopted, and the provisions of the statute have been carried out and applied in many cases almost too numerous to mention. (See *Satterlee*, 40 Cal. 497; *Burnett vs. Mayor and Council of the City of Sacramento*, 12 Cal. 76; *People vs. Satterlee*, 51 Cal. 15; *Lansing vs. Smith*, 8 Cowen, 849; *City of San Francisco vs. Cor.*, Sections 543 and 782.)

The point in the case is that there is no finding upon the defense set up in the answer. That defense is one of making the assessment mentioned in the complaint and ever since that time, he (Townsend) was and is the owner of an undivided half of the lot of land mentioned in the complaint, and no more, and that he does so in the same in joint tenancy, coparcenary or joint ownership with any of the other defendants; and he prays that judgment be entered against him, that it may be a judgment of assessment. The finding of the Court below was that the defendants were the owners in fee of the land at the time the assessment was made, and at the date of the commencement of the action. This is a sufficient finding upon the question of ownership. It was not necessary to determine the respective rights of the defendants, or to find that the defendant, Townsend, owned an undivided half of the lot, as averred in his answer, or that the assessment subserved no useful purpose. The judgment below assessed the whole amount assessed upon the entire lot, and not in any other form. The whole lot was assessed in the entire assessment, and no particular part of it was assessed for any particular portion of the assessment. It requires that the owners of the land, lot, or portion

of lot assessed shall be sued, and there is nothing in the which requires the plaintiff to specify in his complaint is the individual interest of each owner or defendant.

There is no other question in the case which we deem necessary to examine; and no error appearing in the script, the judgment and order are affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed March 30, 1881.]

No. 6621.

DOLAN, RESPONDENT, vs. SCANLAN, APPELLANT

BROKER—CONTRACT—PROPOSAL—COMMISSION. In an action for the recovery of commissions alleged to be due for selling property of defendant. *Held*, that plaintiff must show that he was employed to make the sale; that in pursuance of his employment he found a purchaser in a position ready and willing to complete the purchase on the terms proposed upon. The compensation of a broker is earned by finding a suitable purchaser ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and having introduced a one to the owner as a purchaser, he is not deprived of his right to compensation by the owner negotiating the contract himself. If a proposal is made by one party to a contract it must be wholly accepted by the other, and must be absolute and identical with the terms of the proposal. Hence, where defendant proposed to plaintiff that he should sell his mine, and plaintiff accepted the proposal, the latter should receive a commission for selling his mine, reserving the right to sell it himself, and the defendant himself sold the mine, that plaintiff was not entitled to any commission.

Appeal from the Fourth District Court, of the City and County of San Francisco.

R. J. Wilson, for respondent.

L. Quint, for appellant.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action to recover certain commissions which, it is claimed, the defendant agreed to pay the plaintiff for selling certain mining property.

The complaint alleges that the defendant was the owner of a mine in Mariposa County, called the Golden Virgin mine, and that he employed the plaintiff to sell it for him; that the plaintiff agreed to pay plaintiff for his services in making a sale of the sum of \$5,000; and that the plaintiff did, in pursuance of his employment, on the twentieth day of May, 1877, negotiate

the sale of the mine to one C. W. Thomas for the defendant refuses to pay him his commission.

Objections of the complaint are denied by the answer. The court below gave judgment in favor of the plaintiff. The plaintiff moved for a new trial, upon the grounds, among others, the insufficiency of the evidence to justify the decision; and the same is against law. The evidence is sufficient in this:

1. It failed entirely to show or establish any connection between the plaintiff and the defendant.

2. The said evidence failed to show that plaintiff found the defendant for said mine.

3. The evidence does show that the defendant induced the purchaser and actually sold the mine to him, aided and unassisted by the plaintiff."

4. Motion for a new trial was denied, and from the order of denial the defendant appealed.

5. In an action for brokerage or commissions for a sale of property, two things are necessary to be established, that the plaintiff was employed to make the sale, and that in pursuance of his employment he found the defendant in a situation ready and willing to complete the sale on terms agreed upon. (*McGarick vs. Woodlief*, 20 Cal. 221; *Middleton vs. Findla*, 25 Cal. 76; *Phelan vs. Phelan*, 10 Cal. 306.)

6. By the record that in the year 1876, the defendant engaged in opening the mine referred to, and, at the same time, trying to sell it. While so engaged he availed himself of the proffered services of the plaintiff, who resided in San Francisco, to buy for him certain articles of machinery for a stamp mill, which he was putting up on the mine, and he sold them to him. He had bonded the mine to a certain person, and they were examining it with the view of purchasing it, but they all failed him; and becoming anxious to sell, and to get the requisite means to develop it, he wrote to the plaintiff on the sixteenth day of January, 1877, as follows:

"What I want is means to open the mine properly, or to

* Now I would like you to see it, and you can get parties to buy, so as you could make \$5,000 or more. I would like you to make it sooner than any one else. If you answer this I will tell you in my next letter what to do for the mine. * * * Write soon and let me hear from you. You can get parties to buy. But I reserve the right to do as soon as I can."

In answer to this letter the plaintiff wrote on the twenty-

second of January, 1877, * * * "If I can, I will go and see you and probably be able to do something for you * * * Let me know when you write again how much will take to put an incline from the tunnel to the mill. I will know all the particulars, and your lowest price for the mine. You know it will be secret between you and I. I only want to know how to work. I will do my very best for you." On the fourteenth of March, 1877, defendant wrote again to the plaintiff as follows: "I must sell the mine and part of it. * * * There is fine rock in the level where the vein is solid, but I can't get it without a pump. The mine is a good one, but the opening of it is heavy on me. I can't get more than \$15,000, let it go and I will give you \$5,000."

These letters evidence a proposal by the defendant and acceptance by the plaintiff. The acceptance was of the whole of the terms of the proposal; for where one proposes to another a contract, it must be wholly accepted or rejected; it cannot be accepted with a difference of terms. (*Strickland vs. Catlin*, 35 Ala. 611). An acceptance must be absolute and identical with the terms of the proposal. Where, therefore, the plaintiff accepted the terms contained in the letters of the defendant, the letters constituted a binding executory contract between the parties, by the terms of which the plaintiff engaged himself as a special broker to sell the mine for defendant, with the measure of his brokerage compensation fixed and agreed upon, reserving to the defendant himself the right to sell.

Within the scope and warrant of the terms of this contract the plaintiff had authority to sell, but this authority was limited by the right reserved by the defendant. Under no right the defendant, if he sold the mine, would not be liable to pay the plaintiff commissions; he undertook only to sell for a sale effected through the agency of the plaintiff. The right existed in the defendant independent of the reservation of it in the contract; for a party who employs a broker to sell real estate may, notwithstanding, negotiate a sale himself, and if he does so without any agency of the broker is not liable to him for commission. To earn his commission the broker must be an efficient agent in, or the procuring cause of, the contract. (*McClave vs. Paine*, 49 N. Y. 415. *Wylie vs. Marine National Bank*, 61 N. Y. 415.)

Now, the mine was actually sold to the person referred to in the pleadings, on or about the twentieth of May, 1877, for \$20,000, \$5,000 of which were paid, and the balance secured by a promissory note, payable in eight months,

thereof secured by a mortgage upon the mine. Plaintiff did not find the purchaser, nor make the effort to assist or co-operate in making it, nor was he the cause of it. The defendant himself negotiated and acted entirely independent of the plaintiff. It is true there is some conflict in the testimony upon the subject, but it is not substantial. There is a great preponderance of evidence in favor of the defendant. The plaintiff himself, in his testimony, says: "I have brought this action for damages to me for his (the defendant) selling the mine. I would have paid the money if he sold the mine." He admits that he spoke to the purchaser about buying the mine, and that he was wholly unacquainted with the man until introduced to him by the defendant after the mine had been sold. "Thomas," he says, "but was not acquainted with me about the twelfth or fourteenth of May, or along about that time when I had an introduction to him." Nor did he attempt to see him about purchasing, although he was aware of the fact that the defendant had been, for some time, trying to negotiate with Thomas for a sale.

"I did not go down to see Thomas to push this case because I thought I had other better parties than Mr. Thomas at this time; men who would give more." And he admitted that he had anything whatever to do with the matter after it had been negotiated and closed by the defendant, after that he claimed that he had found Thomas as a purchaser, because he had written to the defendant to come to New York city and sell the mine to any one who would buy. The question, namely: "And you claim that you discovered Thomas as a purchaser of the mine; that it was your efforts?" he answered: "On the last, when a purchase was made and the purchase closed, I claim that I told him that I wrote for the defendant to come down to New York to look after this mine with any man that would give us \$30,000." On the first of May he had written to the defendant that he had sold the mine, or was in a fair way to sell it to a New York company for \$30,000, and he wrote: "I will either have to come down or send me a power of attorney when I notify you." But on the fourteenth of May he wrote to the effect that nothing could be done: "I cannot come down right away, and if we cannot sell it for \$30,000 now some money upon it. * * * I do not see anything for you to do than to come down to the mine to make some arrangement, for I have no authority to sell it."

It was shown that the offers to sell to a New York company were made on

the plaintiff's behalf by one with whom he had promised to divide his commission in case he effected a sale. But he said to him at the same time, "If we do not sell within a day or two or get some one interested in the property to examine it, Scanlan (the defendant) will sell it to Mr. Thomas, and there is no commission in it for us."

The defendant, after these letters, came down to San Francisco, and finding that plaintiff had not and could not effect a sale, he resumed negotiations with Thomas and sold the mine to him. In these negotiations the plaintiff did not in any way participate.

Of course, if the plaintiff had found Thomas, as a purchaser, and brought him and the defendant together, or if he had told Thomas that the mine was for sale, and the defendant that Thomas wanted to buy, and if, under these circumstances, the defendant had taken the negotiations of sale into his own hands, and effected a sale, he could not refuse to pay the plaintiff the stipulated commission. The commission of a broker is earned by finding a sufficient purchaser ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and having introduced such a one to the owner as a purchaser, he is not deprived of his right to commission by the owner negotiating the contract itself. (*McClave vs. Paine*, *supra*; *Lyon vs. Mitchell*, 36 N. Y. 235; *Jewett vs. Emson*, 2 Robt. 167.) But none of these things were done by the plaintiff. No positive act or word proceeded from him which originated, aided, or co-operated in the negotiations with Thomas, or in the final transaction of sale to him. The testimony of the plaintiff upon that subject concludes him.

Unquestionably the plaintiff, personally and jointly with a third party, expended some time and labor in trying to find a purchaser and to negotiate a sale, but his efforts were unsuccessful, and after the sale had been made by the defendant he rendered some services to the defendant by introducing him to a lawyer who supervised the papers of the sale which had been prepared by the attorney of the purchaser. But these services, rendered after the sale, were not "within the encompassment and drift" of the plaintiff's employment, and none of the services which were rendered were assistances to the sale. Neither for them, nor for his unsuccessful efforts in finding a purchaser, is the plaintiff entitled to commission. The essence of his contract was the obtaining of a purchaser. (*Lincoln vs. McClatchin*, 36 Con. 136.)

Judgment and order reversed.

We concur: Ross, J., McKinsty, J.

IN BANK.

[Filed March 28, 1881.]

No. 6459.

MATTER OF THE ESTATE OF W. H. MOORE,
DECEASED.

PETITION—ESTOPPEL—SUCCESSION. A deed executed by a woman of "all her right, title and interest in the real estate left by her said husband," does not convey her right to a homestead or prevent her from claiming a homestead out of the property left by her husband. Such deed only conveys the interest in the property which the husband acquired by succession under the law. A homestead right is a right which vests under the law by succession. The homestead is for the benefit of the widow and minor children. Hence it is material that the petition for setting apart the homestead was filed by the widow alone; it being sufficient to put the homestead in motion, the Court will protect the interests of the children.

from the Probate Court, Santa Cruz County.

McCann, for appellant.

W., for respondent.

J., delivered the opinion of the Court:

An appeal from an order denying the application of a widow of deceased that a homestead be set aside. The case was heard in Department Two of this Court, and its decision was filed October 7, 1880. Subsequently an application for a writ of habeas corpus was made, and the case was heard by the Court in bank and such hearing has been had. We are satisfied of the correctness of the opinion of the Department. The homestead to be set aside should be for the benefit of the children of the deceased as shall be determined by the date of the order setting it aside. It seems material that the petition of the widow was on behalf of herself alone. Her petition was sufficient to set the property in motion, and the Court will, where there are children, see that their interests are protected. According to Section 1485, C. C. P., it may well be said that the language there used is quite clear if applied to a homestead declared in the lifetime of the spouses; but if an attempt is made to apply it to a probate homestead, the language is quite obscure, if not meaningless. "Persons who purchase or otherwise, to the interests, rights of successors to homesteads, or to the right to have set apart," etc. Does that language embrace the

idea, "successors to the right to have homesteads set apart." If so, there is no meaning in it; there is no such thing as a heirship to have a probate homestead, though there may be a heirship after the property has been set aside. Does the language embrace the idea, "succeeding by purchase or otherwise to the interests of successors to homesteads"? If so, the words are equally meaningless, because, as stated in the opinion of the Department, nothing which is the subject of sale vests prior to the setting apart. It is true there is a right to apply, and there is equal power in the Court to designate this or the other piece of land; no interest in any parcel of land vests until the action of the Court. In the case of a declared homestead, an instance can be put where those words would apply, viz.: A dies, leaving a widow, a homestead having been declared in his lifetime; the widow thereafter upon has a title to the homestead, and the right to apply to have it admeasured and set apart to her; before doing so she conveys the homestead property, or dies leaving heirs; in such case her grantees or heirs (as the case may be), succeeding "by purchase or otherwise" to her homestead right, i. e., the property which came to her as survivor, may apply to have the homestead, or rather that which was the homestead, but is no longer a homestead (having passed out of and beyond the scope of a homestead, and become property discharged of its former character), set apart to them out of and removed from the administration of, the estate of A, deceased. But an attempt to apply those words to a probate homestead would not readily find a solution. If a widow die before applying for a probate homestead, any right to apply which she might have had is gone; no person succeeds to that right; no adult child of hers can have a right; no minor child can have any right increased by her death; therefore there can be no such thing, under this statute, as successor to the right to have a probate homestead set apart. We are, therefore, of opinion that the section does not apply to the case before us. It might be said that, even if the Legislature intended that a right to apply for a probate homestead was the subject of bargain and sale, it was not intended that any lesser interest than the entire right could be acquired by a vendee; for, if one of the parties entitled to apply—say the mother and minor children—could sell her right, and the grantee apply, such grantee would be entitled to the possession of the homestead as against the mother, and would have a joint interest with the children to the exclusion of the mother, which would be repugnant to the very idea of a homestead. It being the object of the Legislature to provide for a homestead, i. e.,

me for the family, we cannot hold that the statute
r that purpose shall have the construction and
destroying the object in view.

gment and order are reversed, and the cause re-
r further proceedings.

ur: Sharpstein, J., Morrison, C. J., McKee, J.,
J., Thornton, J.

in the judgment, upon the ground last stated in
a of Mr. Justice Myrick: Ross, J.

IN BANK.

[Filed March 28, 1881.]

No. 6458.

MATTER OF THE ESTATE OF W. H. MOORE, DECEASED.

bill of sale of all the personal property owned by a widow, "as
law of her said husband," does not estop her from having such
ty set apart for the use of the family.

from the Probate Court, Santa Cruz County.

& *McCann*, for appellant.

Hall, for respondent.

J., delivered the opinion of the Court:

an appeal from an order denying the application of
of deceased that certain personal property, being
om execution, be set aside. The general facts as
ath of the deceased and the family surviving him
in case No. 6459. The widow, on the third day
husband's death, and before administration, ex-
he children of the deceased by the former marriage
child being then unborn) a bill of sale of all the
roperty owned by her "as heir at law of her said
William H. Moore." It is claimed that this bill of
l estop her from having any of the property now
For the reason stated in the opinion in *Estate of*
6459, and because the bill of sale is in terms
its effect to any interest which she might take as
law, the judgment and order are reversed and the
anded for further proceedings.

ur: Sharpstein, J., Morrison, C. J., McKee, J.,
r, J., Ross, J., Thornton, J.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 171.

THE CONNECTICUT GENERAL LIFE INSURANCE
COMPANY, APPELLANT,

vs.

CHARLES A. ELDREDGE.

PURCHASE OF PROPERTY IMPROPERLY RELEASED FROM MORTGAGE WITHOUT KNOWLEDGE OF SUCH IMPROPER RELEASE. Where a purchaser of a mortgagee or trustee of a trust deed stands in the same position as the holder of a deed, with information at the time that a prior mortgagee or trustee of a prior trust deed has released the property from the mortgage or trust without payment of the notes secured, or their sureties, or express authority from the holder of such notes, such purchaser will take the property subject to any equitable right of the holder of the notes to secure the payment of which the prior mortgagee or trustee of a deed was executed.

A CLAIM ASSERTED WITHIN THE TIME ALLOWED BY LAW, WHEN NO INTERESTING RIGHTS HAVE INTERVENED, IS NOT STALE. The claim of a holder of a note secured by mortgage to cancel a release of his mortgage executed without his consent, and without payment of his note, is not stale if asserted within the period allowed by law, and no intervening *bona fide* purchasers have intervened to render inequitable his assertion of his lien.

Appeal from the Supreme Court of the District of Columbia.

Mr. Justice FIELD delivered the opinion of the Court.

In November, 1871, John Van Riswick sold and conveyed certain real property in the city of Washington, of which he then was the owner, to one George B. Coburn, for the sum of \$7,734.40, for which the latter gave his three promissory notes, each for \$2,578.13, payable respectively in one, two, and three years after date, with interest. To secure these notes Coburn executed to one William H. Ward a deed in trust of the property. This deed authorized Ward, in case of default in payment of either of the notes, to sell the property, and upon full payment of the notes, and not otherwise, to release and reconvey the property to Coburn. The deed was recorded the same month. In February, 1872, Coburn sold and conveyed the property to one Edwin E. May, subject to the deed of trust.

1872, two persons by the names of Aistrop and [illegible] borrowed of the complainant, Eldredge, which they gave their note, payable in sixty days, as security delivered to him two of the three [illegible] before mentioned, which had been [illegible].

Following, Mayhew, who had subdivided the sixteen lots, upon eight of which, fronting on [illegible] street, houses were then being constructed, applied to the Connecticut General Life Insurance Company, agent at Washington, John G. Bigelow, for a loan of \$7,000; and through him the loan was effected, and a deed of trust upon each of the eight lots. To obtain the loan, it became necessary to have the existing deed upon the property discharged. The company required the property as security with any prior lien in addition to the deed of trust to secure Coburn's property was then subject to a prior deed of trust, executed by a former owner to secure the sum of \$7,000. The company left the matter of investigating the sufficiency of the security to [illegible], who was specially instructed to see that the company's first lien upon the property. He employed a trustee of the Coburn deed, to examine and [illegible] the title. In compliance, it would seem, with [illegible] wishes, and in conjunction with Van Riswick, who was himself as the holder of the first note of Coburn, he obtained the consent or knowledge of the complainant, that the other two notes, Ward executed a deed of trust upon the property. It is to set aside this deed, as a violation of the rights of the complainant, that the present suit is brought.

From the evidence contained in the record it appears that in the course of his inquiries as to the condition of the property, [illegible] became fully acquainted with the contents of the deeds of trust, and learned that the notes were not paid. The deeds were on record, and he was duly taken notice of them. The deed of Coburn's property, and limited the power of the trustee of the property. He was in terms authorized to reconvey it only upon the full payment of the notes, and otherwise. The deed showed the time the notes were to be paid, and that by their terms they were not then paid at the time—or, what would be deemed [illegible]—the trustee had no authority to

execute the release. It was not sufficient that the original payees of the notes joined in the instrument, or consented to its execution. So far as they had parted with the notes, they were denuded of power over the subject.

It is not necessary to express any opinion as to the authority of a trustee to release property conveyed to him at any time, where no such restriction, as in the present case, is in terms placed upon his power. We confine our language to the precise point before us. Here there was no authority on the part of the trustee to execute the deed until payment of the notes was made. The fact of the non-payment being known to Bigelow, the agent of the insurance company, knowledge of it must be imputed to the company, his principal, and both must be charged with knowledge of the law, and the consequent inability of the trustee at the time to release the property.

To prevent misapprehension, it is proper to state that we do not wish to intimate any opinion upon the general question whether a purchaser of property may not rely upon the release of a previous mortgage or trust deed found upon the official records of the district where the property is situated without further inquiry, where he has no knowledge of the non-payment of the indebtedness secured; but what we do say is, that where a purchaser (and a mortgagee or trustee) whose trust deed stands in the same position) takes a deed—without information at the time that a prior mortgagee or trustee has released the property from the mortgage or trust without payment of the notes, or their surrender, or express authority from the holder of them—such purchaser will take the property subject to any equitable right of the holder of the notes to secure the payment of which the mortgage or trust deed was executed.

As to the position that the complainant is barred of his relief he asks by laches in asserting his claim, we do not think there is any force in it. The company, as already stated, must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien so gained; nor can it aver that his claim to have the instrument canceled by which this priority was secured is a stale claim when asserted within the period allowed by law, and in the face of the rights of third parties as *bona fide* purchasers have intervened to render inequitable the assertion of his original claim.

Decree affirmed.

District Court of the United States,
AND FOR THE DISTRICT OF CALIFORNIA.

AUGUST TERM, 1880.

SHAINWALD (AS ASSIGNEE IN BANKRUPTCY OF
D, COHEN & Co., AND OF LOUIS S. SCHOENFELD, ISAAC
AND SIMON COHEN, BANKRUPTS), PLAINTIFF,

VS.

HARRIS LEWIS, RESPONDENT.

IN EQUITY.

PIRACY — COLLUSIVE JUDGMENT — FICTITIOUS INDEBTEDNESS —
FICTITIOUS ANTE-DATED NOTES. Where members of an insolvent
firm intent to defraud firm creditors, conspired with a person
in the firm was indebted in only a small amount to have an
assignment levied on the firm property, and a judgment to be taken
on fictitious and ante-dated firm notes fabricated for the purpose,
transfer to him all the firm property then *in transitu*, and for
the firm held bills of lading; and, in pursuance of such con-
judgment was recovered, the firm property sold on execution
by the plaintiff in the collusive suit, and the remaining
of the firm secretly transferred to him: *Held*, that he was
the assignee in bankruptcy, as representative of the firm
for the value of all of the firm property so fraudulently
by him, and will be decreed a trustee of such property and
proceeds for the benefit of the firm creditors represented by the

Crittenden, for plaintiff.

Highton, for respondent.

J.:

Complainant seeks by his Bill in Equity to have a certain
execution, sheriff's sale and other proceedings in a
the Nineteenth District Court of this State, entitled
vs. Louis H. Schoenfeld, Isaac Newman and Simon
red to be a fraud upon the creditors of the firm of
Cohen & Co., and upon the complainant, as their
bankruptcy, upon Simon Cohen, and upon said
that it be declared and decreed that certain promis-
upon which the suit was brought, to wit: a
\$7,000, a note for \$8,000 and a note for \$5,000, were
and void as against said firm for want of consideration;
be declared and decreed that certain transfers of
of lading, promissory notes and other property, to
sent by said Schoenfeld and Newman were fraudulent
against the creditors of said firm, upon the complain-

ant as their assignee, and upon Simon Cohen one of the n thereof; also, that it be declared and decreed that the res is a trustee for the benefit of the complainant, of all the bills of lading, accounts, merchandise, chattels and other p obtained by said Lewis through, or by means of said act attachment, judgment, execution, or sheriff's sale, or tra or delivered to, or received by him from said Schoenfel said Newman, or from any other person, and also for such and other relief, etc.; also, for an injunction and writ of

The facts and circumstances which constituted the fr particularly and fully set forth in the bill. Its allegat sustained beyond all doubt or denial by the proofs.

It is perhaps not easy to imagine a grosser case of cor by merchants of fair repute to cheat and defraud their cr or one where the proofs could be more convincing and in able.

The testimony is very voluminous. But the evidenc tablish the fraud is that of seven witnesses only, viz: Newman, Hyams, Schoenfeld, Naphtaly, Sharp and l nearly all of whom were active participants in the fraud at its inception or during its progress, or at its consumm

I shall not attempt to give a detailed account of the transactions by which the respondent at the instance and aid of Newman and Schoenfeld, two of the three member firm, succeeded in getting possession of the entire asset partnership to the exclusion of all its eastern and foreign c and of nearly all its creditors in this State. It will be s to state the nature and effect of the fraudulent conspir in a general way the means by which those objects were a

The firm of Schoenfeld, Cohen & Co. was composed c partners, Louis S. Schoenfeld, Isaac Newman and Simon Its capital was \$30,000, contributed (\$15,000 each) by Sch and Newman. Cohen was to contribute for a certain his skill and experience in the business, and thereafter to \$15,000 to the capital, or pay interest on such portion th he should fail to furnish. Each partner was to be at li draw \$250 per month for personal expenses.

In January, 1877, it was determined between Schoenf Newman that the former should proceed to the Eastern and Europe to procure, if possible, a large stock of g credit.

Aware that their credit would depend upon their f standing here, and knowing that if the true condition affairs was disclosed Mr. Schoenfeld's expedition woul abortive, they presented to one of the banks of this city statement of their profits and business affairs, sustained entries in their books as to their profits and the amount of loaned to the firm by Newman. Having thus firmly esta their credit, Schoenfeld proceeded to the Eastern Sta

and succeeded in purchasing goods to the amount of \$10,000, cost price.

At the time the false credit was obtained and Mr. Newman started for Europe to make his purchases, it was the intention of Newman and Schoenfeld to cheat the foreign creditors by the whole price of any goods the firm might succeed in obtaining by false pretenses as to their financial condition, and the project was formed after Mr. Schoenfeld's return to the city. It is certain, however, that the preparations for the perpetration of the fraud were taken into effect before his arrival.

Mr. Schoenfeld returned to this city early in June, 1877. On the next day he met Newman by appointment at their office and the affairs of the firm were discussed. A subsequent meeting was soon after held at which Mr. Wm. Bremer, Mr. H. C. Lewis were also present.

A full understanding of the agreement entered into at this time requires some explanation is necessary. The \$15,000 contributed to the capital of the firm by Schoenfeld had been obtained by a loan of \$8,000 from an old friend and former partner, H. C. Bremer, for which he had given his individual note, and paid in, in cash, \$2,000. The remainder, \$5,000, was secured, on his individual note, from Newman, who told him the money belonged to a Mrs. Alexander, by whom it was placed with him for investment. Newman had paid out of the \$15,000 to be contributed by him to the firm, and had also lent the firm on the firm's notes \$18,000. These notes were then held by the London and San Francisco branches of the firm, and had been hypothecated by Newman to secure a private loan of \$20,000. The money had been originally obtained, as stated and as appears to be the fact, from the respondents. This is evidence tending to show that Newman had, without the knowledge of his partners, executed a note in the name of the firm for \$17,000 of the amount. On this point the respondents are conflicting. It is not material. For the note, if it was a fraud upon his other partners, and the respondents insist that the firm note to Newman for the loan was not, it had, in fact, been transferred by Newman to the respondents and had been by the latter lent to Newman to enable him to give collateral security for his loan from the bank.

At the next meeting nothing definite was effected. At the next meeting Mr. Newman explained the embarrassed condition of the firm. He stated that he owed \$20,000, viz: the \$18,000 loaned to him and \$2,000 which Lewis had loaned to him. He stated which he held their genuine note; that Lewis was not in the world, etc., and he insisted that he should be secured. Mr. Schoenfeld replied that if Lewis was to be a confidential creditor should also be secured. This was agreed to, and it was agreed that a firm note for \$8,000

should be executed to Bremer "so that the \$8,000 should be valid against the firm instead of against an individual in case any action should be taken."

This was accordingly done on the succeeding day. The note was delivered to Mr. Wm. Bremer, agent for H. Bremer, to hold it for presentation as a firm debt in case any action was brought against the firm.

Mr. Bremer did not then, nor at any time up to the trial, surrender the individual notes of Schoenfeld or the firm note given by the latter to his brother.

A few days subsequently Mr. Schoenfeld received a notice from the Anglo-Californian Bank to make good the firm's indebtedness. This notice he communicated to Newman. A meeting was at once held to make arrangements for the consummation of the fraud which was in contemplation. It was held in the private office of Lewis, and was attended by Newman, Schoenfeld, Newman, Lewis, and Mr. Naphtaly, as legal adviser. The avowed object was to defraud the firm creditors by placing the entire assets of the firm in Lewis' hands, who was first to pay Newman's indebtedness to himself and the firm's indebtedness to him of \$2,000. He was also to pay Schoenfeld's indebtedness of \$8,000 to Bremer, and also the balance of the firm's indebtedness of \$4,000 to Newman or Mrs. Alexander. The payments should ever should remain after making these payments was provided between Newman and Schoenfeld. To enable Bremer to attach the property of the firm it was necessary that he should appear to be a firm creditor, and for this purpose a fabrication of firm notes was required.

At Mr. Naphtaly's suggestion, a demand note for \$4,000, ante-dated as of December 23, 1876, was drawn up and signed by Mr. Schoenfeld in the firm name. Mr. Naphtaly, however, objected to the form of the note, as it appeared on its face to be long overdue. It was, therefore, destroyed, and a new note was made, ante-dated in like manner, but payable six months after date. A note was also made, by Mr. Naphtaly's suggestion, in favor of Mrs. Alexander for \$4,000. This, too, was ante-dated. These notes were given to Mr. Naphtaly with the understanding that an attachment suit should forthwith be commenced against them—the fabricated firm note given to Bremer, and the note for \$4,000 held by Lewis.

The note for \$4,000 was returned on the same evening to Mr. Naphtaly, who, on reflection, preferred that the note should take the form of an antedated firm guarantee of the firm's original note, rather than of a newly fabricated note in favor of Mrs. Alexander. The reason assigned for this preference was, according to Schoenfeld, that when there was a genuine debt there was no need of resorting to a fabricated one.

The difference either in morals or laws between fabricating an entire instrument and fabricating and antedating a firm note

s note to Newman, he did not, when examined as
empt to explain.

liminary preparations for carrying into effect the
signs of the conspirators, were made with the full
the respondent. He acted as their chosen and
nent. That the firm was insolvent he was well
choenfeld testifies that a few days before Lewis
to him and Mr. Newman "to go ahead with the
e thought we could run it, and he would give us
keep it up for a year or two longer and we could
credit and then burst up."

ent designs of the parties, and the complicity of
fessed by Mr. Naphtaly himself. He testifies that
enfeld and Lewis desired this attachment suit to
nd to secure *all the property of the firm of Schoenfeld,*
by means of that suit, and they all acted in concert
until Lewis and Schoenfeld had the fight in the

ly's Test. Trans. p. 878-9.

*he that he was going to make more than his claim, and
anything for outsiders."*

ly's Test. Trans. p. 881.

citous epithet Mr. Naphtaly designates the whole
n and Eastern creditors, whose shipments, arrived
it was proposed to appropriate without the pay-
ble dollar of the purchase money.

ement being thus completed, the \$8,000 firm note
ands was obtained from him, and suit was brought
f Lewis for \$41,000, and an attachment levied on
rade, on debts and accounts of the firm.

or hesitation seems to have been felt by any of the
ir attorney in making the allegations under oath
nstitute these proceedings.

by the sheriff of the stock in trade of the firm, ren-
acticable any longer to preserve the secrecy which,
e, had been carefully guarded.

and the agent for the foreign creditors became
pressing in their demands that the suit should be

danger which threatened the success of the plot was
n of bankruptcy proceedings before a levy under
l execution could be made.

efore thought that some show or pretense of de-
nit should be made. The attorney selected by Mr.
this purpose was Mr. W. H. Sharp. It does not
t this time Mr. Sharp was informed that the notes
suit was brought had been fabricated, and that,
ption of the \$2,000 note to Lewis, they represented
tedness of the firm. But he did know, or rather he

supposed, that a fraud on the Bankruptcy Act was involved. That the suit was to be an "amicable" one. That no defense was to be made and no obstacle interposed to prevent the plaintiff from obtaining the preference over all the creditors of the firm in which the suit was instituted to secure.

The foreign creditors of the firm were represented by Shainwald. He was very anxious that the suit should be granted, and was distrustful of Schoenfeld's assurances that a defense was intended. This was communicated to Mr. Sharp, who replied, "I know Shainwald; I will speak to him; bring him to me." Mr. Shainwald was soon after brought to Mr. Schoenfeld's office, and told by the latter that the suit would be denied. On this point Mr. Sharp's testimony is as follows:

"Q. Then you said 'bring him to me'?"

"A. Yes, sir.

"Q. Then you told Mr. Shainwald that the suit would be defended?"

"A. That I was employed, and would defend the suit."

"Q. How could you make such a statement if you were not so employed?"

"A. The day before that, it was understood that I should make that demurrer—make that defense.

"Q. A frivolous demurrer for delay?"

"A. Yes, sir; that is so; I don't know that I used that language; I may have said so.

"Q. What made you tell him so if you were not employed to make any defense, and it was with the understanding of your knowledge, an amicable suit, and you were not to the plaintiff in getting the judgment at the earliest day, to defeat the Bankruptcy Act?"

"A. The object was to assure Mr. Shainwald that a proaching default would not be allowed to be entered which was so much concerned about.

"Q. Was that a falsehood?"

"A. I was not under any obligation to him, I thought." (Test., Trans. p. 987.)

With regard to this interview, Mr. Schoenfeld testified that Mr. Sharp told Shainwald that "it would be quite a while before the suit would come up, and that he could fight it for some time; and that Shainwald left the office satisfied that he would have ten days, and that he would have enough claims filed in the Eastern District of New York within that time to put the firm into bankruptcy. It was understood privately, however, between Newman and Schoenfeld and myself, that instead of the usual ten days allowed on over a demurrer, Sharp should take only three days. Naphtaly testified that he had fixed things with Sharp when he employed him. Mr. Schoenfeld testified that he had employed Sharp for defendants in the Lewis suit, and that he had an understanding to take judgment in three days and

of the demurrer. (Schoenfeld's testimony, Trans. pp.

ment was taken accordingly.

Mr. Sharp's assurances do not seem to have allayed Mr. Sharp's apprehensions. He still continued importunate in his demand on Mr. Schoenfeld that he should at once go into bankruptcy. He had discovered that there were only two ways in which to answer. Unable to find any pretext for Mr. Shainwald's importunities, Schoenfeld applied for admission to bankruptcy. Schoenfeld testifies that he was told by Mr. Sharp to "tell him (Shainwald) that Mr. Sharp had neglected in the answer; that it was an oversight of his which he had made, and came to me not to take advantage of it. For I do not let him get any papers in the United States Court before 10 o'clock in the morning." (Trans. p. 617.) Mr. Schoenfeld's representations with regard to the intended defense of the firm were made to Mr. Belknap, an attorney employed by

Mr. Sharp. Mr. Schoenfeld testifies that he really intended to deceive Mr. Sharp in regard to the matter, and make him believe that he was employed to defend the suit. (Trans. p. 913.)

Mr. Sharp, however, assured that it should receive a *pro rata* share of whatever sum the goods might bring at the sale on

the firm's assets. Mr. Sharp inserted somewhat minutely into these repulsive details of fraud and deception because they were necessary to show the true nature of the matter and to cavil the fraudulent and collusive character of the sham defense that was made to it.

It is hardly necessary to add that Mr. Sharp, the attorney for the defendants, sent his bill to and was paid by Lewis,

the firm's agent made with the banks for a *pro rata* share of the sale on execution, made it for the interests of the firm that Lewis should bid them in for the lowest price.

Mr. Sharp was spared to accomplish this object. Only the insignificant advertisements were published, and but little opportunity was afforded to the public to ascertain the value and quantity of the goods. But a private inventory with the cost prices was made out, and given exclusively to Mr. Lewis. This was made to discourage other parties from bidding, and the goods of the store were sold by the floor, and not in lots, and were sold at the most advantageous prices.

Mr. Sharp succeeded in becoming the purchaser for a sum far in excess of the market value of the goods. It is unnecessary to recount in detail the remaining steps taken to carry out the fraudulent designs of the parties.

It is sufficient to say that by various methods Lewis succeeded in obtaining possession of almost the entire assets of the firm, in-

cluding the bills of lading for the goods purchased abroad by Schoenfeld. Nothing has ever been paid to any of these creditors.

Several months having elapsed, Mr. Schoenfeld became impatient for the payment to Mr. Bremer of the \$8,000 promised as his share of the plunder. To this Lewis demurred. A quarrel ensued, and Schoenfeld disclosed the whole affair to Mr. Cohen, who seems to have been up to that time ignorant of its real nature.

Legal advice was at once taken, and Mr. Crittenden, solicitor for complainant in the present suit, on behalf of Cohen requested of Mr. Sharp to consent to his substitution as attorney for Cohen or that Sharp should unite with him in a motion to set aside the judgment. Mr. Sharp declined both propositions, although he was advised by Mr. Crittenden of the nature and origin of the fabricated notes upon which judgment had been recovered, and was informed that Cohen had never been served with process in the suit, and had been kept in ignorance of the proceedings.

Mr. Crittenden thereupon determined to move in the Nineteenth Court that he be substituted as attorney for Cohen, and that the judgment be set aside. The motion was accordingly made on affidavits alleging in substance what has been proved in this cause, and narrated in this opinion. The motion was opposed by Mr. Naphtaly assisted by Mr. Sharp, who furnished him with an affidavit and gave him "all the co-operation in his power that the judgment should stand."

Mr. Sharp states that his reason, or one of his reasons for this was that the rights of other persons were concerned. When asked to whom he referred, he replied that he referred to Mr. Lewis.

The motion to set aside the judgment was denied by the Court. The motion to substitute has never been decided.

On the twenty-sixth day of April, 1878, a voluntary petition in bankruptcy was filed by Cohen and Schoenfeld under which the firm was adjudicated bankrupt. Mr. Shainwald was subsequently appointed assignee and the present suit was commenced.

No comment is necessary upon the facts related in the foregoing narrative. They exhibit as flagrant a case of gross and deliberate fraud upon creditors as can well be imagined.

The fraud derives an additional heinousness from the fact that a Court of justice was made the instrument of its perpetration by its own officers, whose highest professional duty was to do mean themselves uprightly before it, and to scrupulously abstain from all attempts to deceive or impose upon it.

The Court was not only induced by falsehood and deceit to render judgment for the plaintiff in a collusive suit, brought upon fictitious demands, but it was prevented from correcting its error by the strenuous opposition of both the attorneys, supported by their own affidavits.

like these are suffered to pass without exposure the legal profession will rapidly decline in public authority of the Courts will be weakened, and even law itself, without which free institutions are impossible gradually but surely destroyed.

perpetrated in this case are, therefore, more than g. They rise to the bad eminence of a public

amount of the decree I have sought to ascertain the firm's assets which came into the possession of . The nature of the inquiry forbade the hope of ate result. I have indicated in a memorandum decree the various items of which the aggregate composed. To enumerate them here and to give testimony in regard to them, would greatly increase is opinion already longer than I could have wished. ps not be thought unreasonably long when it is at the testimony in the case covers more than dred written pages. Besides, *non sunt longa quibus emere possis.*

, 1880.

[Filed March 30, 1881.]

No. 231.

AINWALD, ASSIGNEE IN BANKRUPTCY, ETC.,

VS.

HARRIS LEWIS.

IN EQUITY.

IN EQUITY is obtained against a defendant for a sum of execution has been returned unsatisfied, a Court of equity action of a bill alleging that the defendant has secreted his and is disposing of the same with the avowed intent of de- ne complainant, and depriving him of the fruits of his praying an injunction and receiver. It is not necessary in to particularly describe the assets, whether equitable or not, e reached, and a Court of equity will issue an injunction, receiver, and compel an assignment of all the property of ant, when such action is necessary to defeat the fraudulent the defendant.

upon such a showing to the Court by petition in the orig- writ of sequestration may not issue?

r under such an original decree, and upon the showing ioned, the Court has not the power to issue an injunction an order for a receiver and assignment, without requiring inant to file a so-called creditor's bill, or to wait for the re- execution unsatisfied?

Opinion on motion to revoke appointment of receiver.

James L. Crillenden, for plaintiff.

_____, for respondent.

HOFFMAN, J.:

On the fifth day of November, 1880, a decree was entered this Court against the above named respondent, by which he was adjudged to have obtained possession of the funds of the bankrupt firm of which the complainant is assignee, by fraud and collusion, and by means of fraudulent and collusive judgments against the firm founded on fictitious debts.

He was, therefore, decreed to be a trustee for the complainant of all such funds, and was required to pay over to the complainant the amount thereof as ascertained by the decree.

On this decree an execution was issued and returned unsatisfied.

A bill was thereupon filed by the complainant setting forth the previous proceedings in the cause, and averring that the respondent had procured a homestead to be declared upon his property—had sold valuable real estate and threatens, intends and is about to leave and depart the United States, and take and carry with him all his money and other property, with the intent, object, purpose and design of preventing the same from being levied upon in satisfaction of said decree, and with intent to hinder, delay and defraud this complainant of the moneys and property to which he is entitled under said decree.

That since the enrolling of said decree the respondent has secretly transferred a large part of his property to divers persons, and has secreted the remainder of his property with intent and design aforesaid, and to prevent said property from being seized on execution or secured or applied to satisfy said decree.

That the respondent has stated and declared to divers persons that he had so fixed his property that it could not be seized to satisfy said decree.

That the respondent has property debts and other equitable interests to the value of \$90,000, exclusive of all just prior claims thereto, which the complainant has been unable to reach by execution.

That the action is not commenced by collusion with respondent or with any other person for the purpose of protecting property or effects of the respondent against the claims of creditors.

The bill contains the usual prayer for an injunction for receiver and for other relief.

Upon this bill an injunction was issued and a receiver appointed to show the respondent was ordered to make an assignment of his property and effects.

This he at first refused to do and was committed for contempt.

quent day he executed the assignment, which, by Court, remained in the custody of the clerk until and decision of the present motion to vacate the appointment of a receiver, and for the execution of the assignment.

It has accordingly been made and argued.

On the grounds:

The bill of complaint herein does not disclose any facts and for the appointment either of a receiver or

on the facts disclosed in the affidavits and papers the appointment of a receiver or referee is unnecessary. The motion states "that it is based upon the facts respondent herein, with copies of which you are furnished, and upon all and singular the records, papers, proceedings in this suit."

On the motion an amended bill was presented and an affidavit. It is unnecessary to detail at length

It is sufficient to say that they corroborate the facts of the bill, and of the affidavits in support of it, and facts tending to show the absolute necessity for the appointment of a receiver to prevent the loss to the respondent of the property and assets of the respondent, the trust funds invested by him in the goods, wares, and chattels contained in a certain store in the State of Nevada

The bill further alleges the institution, in the State of Nevada, of a collusive suit by a pretended creditor of the respondent, founded on a fraudulent and fictitious indebtedness, to have the proceeds of said trust funds in the State of Nevada sold and sold under execution, and with the design of delaying, and defrauding the complainant.

If the allegations are true, or even partially true, a stronger case for the appointment of a receiver could not well be im-

The Court can interpose in the most summary manner and its decree will be remediless, and its decree abortive.

It is to set aside the order for the appointment of a receiver based on any denial of the facts alleged in the affidavits, of which a summary has been given.

On the denial of the jurisdiction of a Court of equity to grant the relief prayed for.

That the jurisdiction exercised in the Courts of New York to entertain what the counsel denominates the "creditor's bill" is entirely the creature of the statute.

That under those statutes equity could only enter-
tain a bill filed for the purpose of removing fraudulent
obstructions to the service of an execution

against real or personal property, or for the purpose of subjecting equitable assets to the operation of the execution when the same had been returned unsatisfied, and the legal remedy thereby shown to have been exhausted. But it is contended that in such cases the equitable assets must be described and indicated in the bill, or in a supplemental or amended bill if afterwards discovered.

It is also contended that the bill in this case must be considered precisely as if founded on an ordinary money judgment at law, and that no notice can be taken of the fact established by the original decree that the demand arose out of a fraud and conspiracy of the grossest kind, and that the respondent has been adjudged a trustee of the funds thus fraudulently obtained and appropriated. All jurisdiction to arrest a fraudulent judgment debtor in the execution of an avowed purpose to transfer, sequester and make way with his property, in order to defeat the claim of his judgment creditor, is denied unless the creditor can describe and indicate the secreted property. And, even in that case, unless the position of counsel is misapprehended) the property so described must be equitable assets which cannot be reached by an execution at law.

But in this state equitable assets can be reached by an execution at law.

The aid of equity to reach such assets when known would be required, and the jurisdiction of the Court to entertain creditor's bills would be limited, if the position of counsel be correct to bills of the first class above mentioned, viz.: bills filed to remove obstructions or impediment to an execution.

I think it can be shown that the contention of counsel, that the equity jurisdiction exercised by the Court of chancery in New York was exclusively derived from the Revised Statutes of that State, is an erroneous view of the origin and foundation of that jurisdiction.

The point was elaborately considered by the Vice-Chancellor in *Storm vs. Waddell*, 2 Sandf. Ch. R. 510-12. In that case he observes: "The practice of filing bills in this Court by unsatisfied judgment and execution creditors, which has become so established and familiar, is usually referred to the revised statutes as to its origin. (2 R. S. 173-4.) The statute is undoubtedly sufficient to sustain all the argument that was presented in support of the effect of such a suit; but, as I desire to refer to the period prior to that time when the revised statutes went into operation, I will advert briefly to the earlier history of this jurisdiction.

"The power of the Court of Chancery to aid in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of a debtor, is an old established ground of jurisdiction, which is not in question here.

in those cases was auxiliary to the carrying into process of the law courts, and differed from our case, now under consideration, in this, that in the case of a fraudulent conveyance of land, so as to avoid a judgment, the bill need not allege anything to the recovery of the judgment; and where it was to the obstruction affecting movable property, it was only to allege an execution issued to the county where the property was situated; while in the creditors' bill, against interests and things in action, the creditor must show that an execution, and its regular return unsatisfied.

In the case of *Spader vs. Hadden* (5 J. C. R. 280), Chancellor sustained a creditor's suit of the description now in question, in moneys in the hands of Hadden, transferred to him by the transfer being fraudulent against creditors. This was affirmed by the Court of Errors in November, 1823 (ns. 554). A majority of the Court, with Chief Justice and Mr. Justice Woodworth (the latter delivered the opinion), concurred in holding that the case was one of alleged equitable cognizance, and the reasoning of the Chancellor was applicable as well to the case of *funds being in the hands of the debtor* as to the case decided.

In the case of *Donavan vs. Fin* (Hopk. R. 59-77), decided in 1823, the Chancellor omitted to follow the result of the case in *Hadden vs. Spader*, and viewed the latter as a case of fraud. But I submit with great respect that there is much more in the decision than was acceded to it in the case of *Fin*. The goods assigned in *Hadden vs. Spader* were converted into money five months before Spader's judgment, so that there was no property on which a lien could have been a lien. It was, then, the plaintiff having things in action in the hands of a third party, who deemed it unjust that either the one or the other should withhold them from the payment of his creditors. The doctrine of *Donavan vs. Fin* has not been followed in this State, nor, so far as I have seen, approved by more than a minority of the Court.

There is abundant evidence that it was not deemed correct with the decision of the highest Court, in *Hadden vs. Spader*. And, aside from the books, I know from my own observation that it was disregarded prior to the time of the Revised

In the following cases the contrary was decided, or opinions to that effect given: In *Weed vs. Pierce*, 9 Cowen, 722-727—decided by the Court for Walworth when Circuit Judge, sitting in equity, 1827; *Beck vs. Burdett*, 1 Page, 305, January, 1829; *Pettit*, 1 Id. 427—affirmed on appeal in December, 1829, Id. 618, 621-625; and *Edmeston vs. Lyde*, 1 Paige, 673, 1829.

In *Manman vs. Grover*, 4 Paige 23, affirmed 11 Wend. 187,

the bill was filed in 1828 to reach the things in action assigned as the goods of *Grover & Gunn*, and the decree was made against both species of property without discrimination, although the case was most desperately contested throughout. The Chancellor repeated the doctrine of the above cases, at page 33 of 4 Paige, and, as recently as in 1844, he reiterated it in *Farnham vs. Campbell*, 10 Paige, 601. See, also, the Revisers' Notes, in introducing the provisions on the subject, which are contained in the Statutes. (3 R. S. 669, 2d ed.)

"I may, therefore, assume that by the law of this State, as established more than twenty years before this case arose, an unsatisfied execution creditor had a right to file a bill in this Court to compel payment of his debt out of the equitable interests in things in action of the judgment debtor. (*Storm vs. Waddell*, Sandf. Ch. R. 510-12.)"

The authorities cited by the Assistant Vice-Chancellor strongly support his reasoning; and I am justified in holding that, by the ancient usages of Courts of equity as understood in New York prior to the Revised Statutes, chancery "would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands; and that it made no difference whether that property consisted of *choses in action* or money or stock." (2 Kent's Com. 561.)

In *Donavan vs. Fin*, the point decided was, that "where the subject of a suit is exclusively legal, equity has no jurisdiction to enforce or give a better remedy;" that is, to seize upon and apply to the payment of the debt equitable assets, which could not be reached by execution at law.

In *Pettit vs. Chandler*, 3 Wend. 624, the same point arose incidentally, though it was not decided; but the Chief Justice said, "his impressions were that, under the existing law (1829), a defendant is not bound to answer as to property which never was within reach of an execution; that he could only be called upon to respond as to such property as he has fraudulently withdrawn from the operation of an execution."

In *Hadden vs. Spader*, Mr. Justice Woodworth held that a judgment creditor after exhausting the remedies given by law could reach the trust property of his debtor by the aid of a Court of equity, and that he could resort to the debtors stocks and choses due to him, even when the stocks were not purchased or the choses created by means of the property fraudulently withdrawn from the judgment of the creditor. To these views Chief Justice Spencer gave his explicit sanction.

Chancellor Sandford was of opinion, as we have seen, that relief could only be given in cases which were themselves equitable jurisdiction involving fraud or trust, or seeking to subject to the satisfaction of a judgment, property in itself liable to execution by removing a conveyance which operated as a fraudulent impediment to the execution.

Chandler, the Chief Justice, Mr. J. Marcy and
land declined to express any final opinion as to
boundary of jurisdiction, for the power to grant
most extent it was pushed in the case of *Hadden*
about to become in a very few days a part of the
jurisprudence of New York "by legislative recogni-
tion."

was decided in December, 1829. The Rev. Statutes
into operation January 1, 1830.

bar does not demand any attempt on my part to
disputed question as to the jurisdiction of Courts
in which so eminent judges have differed, for the
State permits all choses in action and equitable
reached by execution of law.

on, therefore, to the jurisdiction chiefly relied on by
in *Donavan vs. Finn*, cannot here be raised.

Moreover, in this case is not a bill to reach equitable

It is a bill for an injunction and receiver to pre-
dant from secreting, conveying away, and convert-
ey, property which is justly subject to execution
erty which is in whole or in part the proceeds of
fraudulently obtained and converted by him. It
and baffle the execution of an avowed purpose to
ree of this Court and to render it fruitless to the
creditors whom he has defrauded.

sition upon which the conflict of opinion arose in
ms, so far as the United States Courts are con-
authoritatively settled.

Public Works vs. Col. College (17 Wall. 530), the
t says: "The jurisdiction of a Court of equity to
erty of a debtor justly applicable to the payment
even where there is no specific lien on the property,

and that even if a Court of equity has jurisdiction to
f every description in aid of a judgment creditor,
so where the assets are indicated in the bill, and
o authority upon mere general allegations, such as
ed in this bill, to enjoin the defendant or to compel
of all his property to a receiver appointed by the

ended that the mode of proceeding adopted in this
iar to the State of New York, where it grew up
les framed by Chancellor Walworth, to carry into
visions of the revised statutes of that State with re-
or's bills.

uld seem that Mr. J. McLean entertained bills
bill in this case without hesitation.

et al. vs. Clark, (4 McLean 18), the bill alleged that
nt had equitable things in action and other property

which cannot be reached by execution, and that he also *had debts due to him by persons unknown.*"

These allegations are as general and unspecific as those contained in the bill under consideration, but the bill was nevertheless entertained.

It is asserted by counsel that this jurisdiction was taken under a statute of Michigan, similar to that of New York. But the Court expressly repudiated the notion that a State statute can confer jurisdiction in equity upon the Courts of the United States, although the latter may adopt modes of proceeding and particular remedies, when the cause is within their jurisdiction and the proceeding adopted are conformable to the general principles by which Courts of equity are governed. And with respect to the case before it the Court observes:

"The jurisdiction is appropriate to chancery, and *may be exercised where there is no special statute.* Similar relief is given in England. 1 Vernon 398; 1 P. Wms. 445; 2d Dickens 575; Ambler, 79-455; 20 Johns. 563; 2 Johns. Ch. 283-296; 4 Id. 691."

In *Pettit vs. Chandler*, before cited, the bill, after alleging judgment obtained, execution issued, and return of *nulla bona*, proceeded to state that "for a long time before the recovery of the judgments Pettit had transacted, in his own name, business to a large amount in New York and was possessed of great property, and that he had not pretended or given out that he had become insolvent, or had lost any property, but that just before the recovery of the judgments in favor of the complainant he had suddenly stopped doing business in his own name with the avowed intention of preventing the complainant from obtaining satisfaction of his judgments; that he had so placed his property that none of it was left visible so as to be taken upon execution, with the intent to defraud the complainant; and it particularly charged that Pettit, at the filing of the second supplemental bill *was possessed of real or personal property, or other property of some name or nature, to a large amount; that he was possessed of, or entitled to public stocks, to stock in banks, or other incorporated companies and to rents in real estate; that he held bills of exchange, promissory notes and choses in action to a large amount; and that property, real or personal, was held by others in trust for him, and by colorable title.* The bill stated and enumerated particular acts of fraud which it charged upon the defendant, and concluded by praying a full answer and discovery, and that the defendant might be decreed to satisfy the judgments obtained against him, and that sufficient of his property be set apart for that purpose."

The striking similarity of these allegations to those of the bill under consideration cannot escape notice. The case came up on appeal from an order of the Chancellor allowing exceptions to the answer. It was argued by eminent counsel, but it does not appear to have occurred to them, or to any member of the Court, that the bill was demurrable because it did not partic-

birth and describe the property which it alleged had been sold or conveyed away in trust for the defendant, the title, and the discovery of which, and its appropriateness to the complainant's judgment, was

in the Marcy, in delivering his judgment in this case, says: "The jurisdiction of the Court of chancery to the suits that have ever been assigned to it, power it certainly exercises daily, of requiring answers to such suits as the appellant in this case has wholly omitted to answer imperfectly." (p. 623.)

was decided in December, 1829.

Ubi. Sup.) the practice in cases of this kind is stated as follows:

"Upon the bill, an injunction is taken out and served upon the debtor, restraining the debtor from parting with his property or effects until the further order of the Court for the better protection of the property and its conversion into money, a receiver is speedily appointed, who, under the order of the Court, is vested with all such property, or with specific portions of it to pay the complainant's debts, and all prior claims upon the same; and the debtor is compelled to assign and deliver such property to the receiver under the direction of a Master of the Court."

Good vs. Clark, 4 Paige, 477, Chancellor Walworth

"In cases of creditors' bills where the return of execution presupposes that the property of the debtor, if any, has been misapplied, and entitles the complainant to an order at the first instance, it seems to be almost a matter of course to appoint a receiver to collect and preserve the property. In such litigation, and where the sworn bill of the complainant states that he has an equitable right to all the funds and effects of the defendant to satisfy his debt, and if the right of the complainant is not denied by the defendant in answer to the bill, or a receiver there can be no good reason why the Court should not have a receiver appointed to preserve the property from waste and loss. Indeed, this Court has already held that it is the duty of a complainant who has obtained an order upon such a bill restraining the defendant from paying his debts or disposing of property which might be lost or deterioration to apply to the Court and have a receiver appointed without any unreasonable delay. (See *Wheeler vs. Wheeler*, 2 Paige R. 343.)

"It is sufficient answer to such an application to say there is no property to protect as the complainant proceeds to pay the costs if there be no property, and if there is property the receiver to take the defendant cannot be injured by the appointment."

In *Edmeston vs. Lyde*, the Chancellor says: "The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this Court are perfectly adequate to carry that principle into full effect." (1 Paige Ch. 641, decided 1829. See, too, 25 Barb. R. 663.)

The text-writers lay down the same principle *passim*. T. Barbour says:

"Upon a creditor's bill every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, and his debts, choses in action and other equitable rights may be assigned or sold pending the decree of the Court for that purpose. (2 Barb. Ch. Pr. 152.)

"Under the practice of the New York Courts of Chancery it was held that the order of reference should authorize the Master to appoint a receiver of all the property, equitable interests in things in action and effects belonging to the debtor. * It should also require the defendant to assign to the receiver under the direction of the Master all his property and effects (High. on Rec. § 415; 1 Barb. Ch. Rep. 309-15-16-17; 1 Sa. R. 723.)

But a discretionary power is sometimes exercised as to the amount of the debtor's property to be assigned. (High on Rec. § 429.)

He was compelled, as we have seen, to assign even when he denied that he had any property. (*Bloodgood vs. Clark*, *supra*.)

Until the statute of 1 and 2 Victoria, C. 110, § 20, writs of sequestration were unknown to the English Courts of chancery. Daniell Ch. Pl. and Pr. 1042.

"The decrees of the Court were enforced by process of sequestration, and the party entitled to the benefit of the decree might obtain a writ of sequestration directing the Commissioners then named to sequester the personal property of the defendant, the rents and profits of his real estate until he had cleared his debt. Originally, this process was merely used as a means of coercing the defendant by keeping him out of the possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid is of comparatively modern origin. This, however, as we shall see in the next section, has become the usual course of procedure, and the Court will now, after a sequestration has been issued, enforce a decree for the payment of the money, order the sequestrators to apply what they have received by virtue of the sequestration in satisfaction of the duty to be performed."

Daniell Ch. Pl. & Pr., 1032-3.

The counsel for defendant cites no authority in support of his position, that the practice of entertaining "fishing" bills to reach assets not specifically described in the bill, and of appointing a Receiver over all the property of the defendant, is entirely

of the N. Y. Revised Statutes, and of the rules
 it by Chancellor Walworth.

sions referred to were introduced into the Revised
 . Y. chiefly to set at rest the *questio vexata*, which
 sed by the cases of *Hadden vs. Spader* and *Donavan*
 dy noticed. (See Revisers' Notes, 3 Rev. St., 669,

was given to compel, in aid of an unsatisfied judg-
 r, a discovery of any property, money or things in
 o the debtor or held in trust for him, and to prevent
 of any such property, etc., and to decree satisfaction
 property "*whether the same was originally liable to be*
ution or not."

ne of *Hadden vs. Spader* was thus explicitly recog-
 pted by legislation.

wers of the Court of Chancery was not otherwise
 t was merely authorized to do with regard to assets
 y liable to execution what, it had always been con-
 a right to do with regard to stocks, debts, etc., pur-
 eans of property *fraudulently withdrawn* from execu-

therefore, that Chancellor Walworth adopted, and,
 urt of Chancery was abolished, maintained the rules
 is the strongest argument to show that the practice
 hed was agreeable to the general principles and
 quity procedure.

he authority to entertain "fishing" bills to reach
 assets, and to appoint a Receiver of all the property
 ant is not in terms conferred by the statute.

ntment of a Receiver of all the property of the de-
 truth, as we have seen, in the nature—not of an at-
 t of a sequestration, which by the ancient practice
 of Chancery in England, issued, as of course, upon
 f the defendant to comply with the decree (*Daniell*,
 and the process of sequestration is still in use in
 Id. 1042.)

also seen that the Court will now, where a sequestra-
 a ordered to enforce a decree for the payment of
 r the sequestrators to apply what they have received,
 the sequestration, in satisfaction of the decree.

efore, the aid of equity was invoked in behalf of an
 udgment creditor, and it was settled that all his
 ses in action, debts due him, etc., could be reached,
 r the appointment of a receiver, and for the compul-
 ent to him by the defendant of all his property, was
 e accordance with the ancient usages of the Court of
 hen compelling obedience to its own decree.

el for the defendant insists with much earnestness
 under consideration is identical with an ordinary

creditor's bill, and is to be treated precisely as if brought in aid of an unsatisfied judgment at law. But in such case chancery has no jurisdiction of the original demand. It can only interpose after the demand has been established at law, and after it has been shown by the return of an execution unsatisfied that the complainant is remediless at law.

But, in the case at bar the original suit was of equity cognizance. The decree was obtained in this Court; and perhaps a writ of sequestration might have issued once upon the failure of the defendant to comply with the decree, as it certainly could have done if the decree had been for the specific performance of some act. (Equity, Rule 8, Sup. Ct.)

However this may be, no doubt can, I think, be entertained as to the power of the Court to arrest and baffle the defendant who has already been adjudged guilty of a flagrant fraud in his attempt to consummate it and secure its fruits, in avowed defiance and contempt of the Court.

Says Mr. Chancellor Walworth: "Where such a fraud has been actually committed by a debtor, where he has intentionally placed or even left that property, which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to evade the justice of the law, and this Court, by its ordinary course of proceedings, can reach such property, without doing injustice to any, it does not deserve the name of a Court of equity if it has not jurisdiction to afford relief to the injured creditor." (*Wend vs. Pierce*, 9 Cowen, 724.)

Still less would it deserve that name if it should refuse that relief in the only form in which it can be effectual—viz., by injunction and order for a receiver—on the ground that the defendant has so far carried out his threat to secrete and make away with his property that the complainant is unable to find it or describe it in his bill.

If this Court refuses to interpose until, by bill of discovery or proceedings supplementary to execution, the creditor is able to specify and describe the character of the property, it, in effect, invites the defendant to frustrate its decree, by sending the property or its proceeds out of the jurisdiction, or by conveying it to innocent, or pretended innocent purchasers, or otherwise disposing of it in such a way as to place it beyond the reach of the Court.

Motion denied.

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No. 8.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed March 30, 1881.]

No. 6695.

IN THE MATTER OF THE ESTATE OF PAGE, DECEASED.

ADMINISTRATORS—CONTRACT—ATTORNEYS' FEES—JUDGMENT ROLL—EXCEPTIONS. An administrator has no power to contract with an attorney that the latter shall receive a contingent fee out of the estate for services rendered the estate. Real or personal property of an estate cannot be sold or transferred except by order of the Probate Court. The fees of an attorney must be fixed by the Probate Court and allowed as part of the expenses of administration. In proceedings for the settlement of an account of an administrator, the petition and account and the written objections filed to it are the pleadings which the Clerk of the Court is required to attach to a copy of the judgment, and these constitute the judgment roll. An exception is an objection upon a matter of law to a decision made by a Court. To make the objection effectual in a bill of exceptions, it should be stated, and also the grounds upon which it was made.

Appeal by guardian from Probate Court, Alameda County.

Waldo M. York, for appellant,
James L. Crittenden, for respondent.

McKEE, J., delivered the opinion of the Court:

Appeal from a judgment of the late Probate Court of Alameda county settling the second annual account of the estate of Charlotte M. Page, deceased.

The transcript on appeal contains what purports to be a bill of exceptions, in which it is stated, in substance, that the guardian of a minor child of the decedent had by his attorney, filed written objections to the account of the administratrix, and, that after a hearing had, the Court allowed

the account, to which the guardian excepted, and "now proposes this, his bill of exceptions." What purports to have been the testimony of the administratrix and of her attorney given at the hearing is then stated, and this is followed by the statement that "no evidence was offered on behalf of the contestant," and that "upon such evidence the Court erred in allowing the account as rendered," and also in allowing certain enumerated items thereof.

In all this no exception appears to have been taken to any ruling made by the Court during the hearing of the cause, or to any decision of the Court in the allowance of any objectionable item of the account. An exception is an objection upon a matter of law to a decision made by a Court (Section 646, C. C. P.). To make it effectual in a bill of exceptions the objection should be stated, and also the ground upon which it was made. If it was made upon the ground that the evidence was insufficient to sustain the decision, the deficiencies of the evidence should be specifically state (Section 648, C. C. P.). If it was made upon the grounds of error of law, the proper mode in an action tried by the Court without a jury, is to ask the Court to decide what counsel may consider an applicable principle of law, and, upon a refusal, to have it noted in the bill of exceptions. (*Griswold vs. Sharp*, 2 Cal. 23; *Touchard vs. Crow*, 20 Ib. 163.) But the mere statement in a bill of exceptions, that a party excepted to a decision of the Court, unaccompanied by the objection and the grounds—whether of law or of fact—upon which it was made, does not constitute an exception, upon which any question involved, is examinable by this Court, and, under such circumstances, we can only deal with such questions as may arise upon the judgment roll.

In a proceeding for settlement of an account of an administrator, the petition and account, and the written objections filed to it, are the pleadings which the Clerk of the Court is required to attach to a copy of the judgment (Sec. 670, C. C. P.); and these constitute the judgment roll. (*Estate of Haines*, 30 Cal. 106.) Among the items of the account in the judgment roll of this case, are the following:

"Amount paid James L. Crittenden on account of contingent fee due him for professional services as attorney and counsel in suits on behalf of said administratrix, as per agreement made with him prior to commencement of same, to-wit: one-third money received and collected by him as rents of real property of said estate * * *

\$1, 148.40. (Voucher 17).

"Fee of James L. Crittenden, Esq., for professional ser-

ney and counsel for administratrix in suits on real estate, one-third of real property on San Pablo Island, described in first annual account of administration of the improvements thereon, and of the furnishing personal property on said real property and rein. (Voucher 19.)"

founded upon an agreement with the administratrix contingent fee, the other upon a contract with the administratrix and her attorney for the transfer of an undivided one-third interest in the personal property described in it. This property was not the estate, or it did not. If it did not, it was not an account by the administratrix, and the contract did not constitute a charge against the estate, and was not to have been allowed by the Court. If it did constitute the estate, it was the property of the estate at the death of the decedent, or it was recovered subsequently by the administratrix, in suits instituted in her representative capacity. In either case it was an asset of the estate for which she was accountable. That she had recovered the property for the estate, and the efforts of her attorney, she had no power to, or to make any arrangements in relation to it, and could not have the effect of transferring it to any one, for whatever, so as to bind the estate. The powers of the administrator over the assets of the estate are prescribed by law, and cannot be exercised except according to the provisions of law, and under the orders of the Court in the exercise of its jurisdiction of the estate. Real or personal property of the estate cannot be sold or transferred except by the order of the Probate Court, obtained according to the provisions of Chapter VII of the Code of Civil Procedure. For the sale or transfer of any such property must be entered on the records of the Court. In the absence of any contract made for that purpose by the administrator, it is *ultra vires* and void.

No question of the power of an administrator to recover of any property, real or personal, or for the recovery thereof (Secs. 1582, 1589, C. C. P.); and, as hereto, he is authorized to retain and employ attorneys to recover the property, when recovered, must be inventoried as assets of the estate, and sold for the payment of the same in the same manner as if the decedent had died seized (Secs. 1589, 1591, C. C. P.) And the fees of attorneys to be fixed by the Court, and allowed to the administrator as part of the expenses of administration. As

part of the expenses incurred by the administrator in management of the estate, the compensation of attorney services rendered in behalf of the estate is within the exclusive jurisdiction of the Probate Court. (*Gurnee vs. Maloney*, 38 Cal. 85.) Therefore an administrator has no power to make a contract with an attorney binding upon the estate for the transfer or conveyance of an interest in any of the assets of the estate, or for the payment of a continuing fee out of the assets of the estate. The fee must be fixed and allowed by the Court. To give to administrators authority to pay an attorney in property of the estate for services rendered an estate would be virtually to surrender to them the unrestricted management and disposal of the entire property of the estates they represent. (*Teal vs. Terrill*, 48 Cal. 509.) Whence it follows that the contracts set forth in account of the administratrix were not binding upon the estate, did not constitute a charge or a cause of action against it, and were improperly approved and allowed by the Probate Court. Upon them the administratrix might be personally liable. That an executor or an administrator is, in ordinary cases, personally liable upon contracts made by him in his representative capacity, after the death of the person whom he represents, and, supported by some new consideration, is well established. (*Dvinelle vs. Henriquez*, 1 Cal. 3; *Gurnee vs. Maloney*, 38 Id. 85; Story on Contracts, Secs. 283, 287; Addison on Contracts, 382.)

Judgment reversed and cause remanded to the Superior Court of Alameda County.

We concur: McKinstry, J., Ross, J.

DEPARTMENT NO. 2.

[Filed March 25, 1881.]

No. 6663.

E. WHITING,

vs.

THE CITY GRADING COMPANY.

By the COURT:

This case presents the same questions passed upon in *Whiting vs. Townsend et al.*, No. 6662, and upon the authority of that case the judgment and order are affirmed.

DEPARTMENT No. 2.

[Filed March 28, 1881.]

No. 6656.

WILLIAM M. IBURG, RESPONDENT,

VS.

J. B. FITCH ET AL., APPELLANT.

DETAINER—SEPARATE JUDGMENTS. Plaintiff brought an action against the tenant (Fitch) and the sub-tenants to pay rent, and recovered judgment against the sub-tenant for restitution only of the premises, and was put in possession by writ issued upon such judgment. Subsequently, in the same action, a judgment was rendered against plaintiff's tenant for a forfeiture of the lease and treble damages: *Held*, that plaintiff had no power to render the second judgment, as two separate and independent judgments cannot be rendered in an action of detainer.

from the County Court of the City and County of
San Francisco.

for respondent.

and L. J. Mourey, for appellants.

J., delivered the opinion of the Court:

On the fifth day of December, 1877, the plaintiff brought an action against the defendants in the late County Court of the City and County of San Francisco, for the recovery of possession of a certain lot or parcel of land situate in said county, and for damages against the defendant for the unlawful detention thereof. The complaint alleged that the premises in controversy were leased by the defendant Fitch, and that the other defendants were in possession of the premises holding the same as tenants of Fitch. The case was tried before a jury, and judgment was rendered in favor of the plaintiff. We are now before us for review on the findings alone.

The first finding it appears that the premises were leased by the plaintiff to the defendant Fitch, on the first day of January, 1875, for the term of five years, at the monthly rent of \$100. The term had not expired at the time the action was brought. It appears from the fifth finding that the plaintiff paid according to the terms of the lease, and that the defendant had instituted several actions in the District Court, one in in a Justice's Court, for the recovery

thereof, which actions were still pending when this action was brought. From the ninth finding it appears that on the twelfth day of December, 1877, the plaintiff commenced the action against Fitch and his sub-tenants, and such proceedings were had therein that, on the eighteenth day of the month the plaintiff recovered a judgment against all of the defendants, except Fitch, for restitution only of the demised premises, and that on the same day the plaintiff was put in possession of the premises, under an execution duly issued upon such judgment, and has ever since remained in the possession thereof.

The defendant Fitch left the State of California for the State of Nevada on or about the first day of April, 1877, and was absent from this State at the time the judgment for restitution was entered against his sub-tenants. Fitch returned to this State about the middle of the following year, and on July 13, 1878, filed his answer to the complaint. The case was duly tried, as to the defendant Fitch, by the County Court, and judgment was rendered against him on the eleventh day of March, 1879, for a forfeiture of the lease and for the sum of \$12,150, the same being treble the amount of damages found by the Court.

This is a proceeding under Section 1774 of the Code of Civil Procedure, and it is claimed on behalf of the appellant that when judgment for restitution was rendered against the defendants who were sub-tenants, and writ of possession thereupon was executed in December, 1877, it was not within the power and jurisdiction of the County Court to proceed with the trial of the case against the other defendant, Fitch, for damages, in March, 1879.

The action was for an unlawful detainer, and the foundation of the action was a failure to pay the rent in accordance with the terms of the lease. The section of the Code referred to above provides as follows: "When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any sub-tenant, or any mortgagee of the term of the other party interested in its continuance, may pay into Court for the landlord, the amount found due as rent with interest thereon, and the amount of damages found by the jury. The Court for the unlawful detainer, and the cost of the proceeding, and thereupon the judgment shall be satisfied, and the tenant be restored to his estate; but if payment, as

be not made within the five days, the judgment entered for its full amount and for the possession of the premises. In all other cases the judgment may be entered immediately." By the same section it is made the duty of the Court trying the case to assess the damages occasioned by the unlawful detainer, and to find the amount of the same, and to render a judgment against the defendant for three times the amount of the damages assessed, and of the rent found due. The proceeding was purely statutory in its nature, and the Court was a Court of special and limited jurisdiction. Therefore, essential to the validity of the proceeding the provisions of the statute should be strictly complied with. It was not done in this case, but, on the contrary, judgment for restitution against a portion of the defendants was entered in December, 1877, and a judgment for damages against one of the defendants fifteen months afterwards. There were two separate and independent judgments in this case. We find no authority for this in the Code, and, on the contrary, we think that a very important provision in Section 1174 has been disregarded.

In the same section the following language is found: "If a tenant fail to perform the conditions or covenants of the lease under which the property is held, or after default in the payment of the rent, the judgment shall also include a judgment of forfeiture of such lease or agreement."

The judgment against the sub-tenants did not in terms include a judgment of forfeiture of the lease, but it had that effect, and it was a determination of the lease, for upon it an execution was issued, and the landlord was restored to the possession of the demised premises. If such proceedings as were entered in this case were sanctioned, the clause giving to the landlord or sub-tenant five days within which to pay the rent and save the forfeiture would be defeated. The section provides that if payment be not made within five days the judgment may be enforced for its full amount and for the possession of the premises. It was enforced for the possession of the premises, as we have already remarked, in December, 1877, and, in our opinion, it was not competent for the same Court to enter another judgment for treble damages in March, 1879. The section is highly penal in its character, and a landlord seeking to avail himself of its harsh provisions must bring himself strictly within its provisions. The judgment is not reversed.

For: Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 1, 1881.]

No. 6586.

HOWARD, APPELLANT, vs. DONAHUE, RESPONDENT.

ACTION FOR MONEY HAD AND RECEIVED. Defendant perfected his title to a tract of outside lands in San Francisco, sold a portion of the tract to the city for a park, an award therefor was made to him and amount paid: *Held*, that the acts of defendant in perfecting the title were enured to the benefit of his grantees, he having disposed of portions of the tract before that time: *Held*, further, that plaintiff, claiming under one of said grantees, could not recover in this action his proportion of the award without paying his proportion of the costs incurred by defendant in perfecting the title to the tract: *Held*, further, if defendant did not receive the portion of the award due the grantee of plaintiff, that the latter could not recover in this action for money had and received.

Appeal from the Fifteenth District Court, City and County of San Francisco.

Patterson, Lloyd & Newlands, for respondent.
Pringle & Hayne, for appellant.

Ross, J., delivered the opinion of the Court:

This is an action for money had and received, and proceeds upon the theory that the defendant has in his possession money which *ex aequo et bono* belongs to the plaintiff.

The controversy grows out of the facts that on June 1861, the defendant, then being the claimant of a certain tract of land called the Donahue tract, containing 296 acres of what are known as the outside lands of the City and County of San Francisco, conveyed by deed of grant, bargain and sale to one Butters an undivided interest therein equal to ten acres. The defendant also conveyed some other interest in the tract to other individuals. After the passage of the Act of Congress of March 8, 1866, relating to the outside lands, and the appropriate State legislation, Donahue caused the Donahue tract to be delineated upon the map of the outside lands, and paid all the necessary taxes and assessments. Afterwards a part of this tract was taken for Golden Gate Park, and an award made for the part so taken. Donahue demanded the amount of the award, and received from the proper officer a part of it, on the receipt of which he executed to the city a deed for all that part of the Donahue tract taken for the Park. The amount retained by the officer—\$20,000 or \$22,000—was retained by him for the purposes

shares of the vendees of Donahue other than the names of those other vendees appeared on the deed, the name did not, and the officer knowing nothing on his part, paid, as is contended by the plaintiff, of the award corresponding to the Butters' interest as the defendant. Neither Butters nor any of his heirs appear ever to have had actual possession of any land, nor to have paid any part of the taxes or assessment, nor to have had anything to do with the delineation or claim upon the map. The first that seems to have taken of that interest since the defendant's deed in 1861, was the demand made on the defendant shortly before the commencement of this action, by the plaintiff, who had, by his payances, succeeded to one-half of Butters' rights, and the portion of the award corresponding to the interest

is not pretended on the part of the plaintiff that any of his grantees ever, personally, complied with the requirements of the legislation relating to the outlet, yet it is contended that by reason of the relation between them and the grantor, defendant, the common title, the latter with those requirements, made, as it is for the furtherance of their common title, enured to the benefit of the vendees. Conceding that to be so, it is obvious that the defendant cannot claim this benefit without paying his proportion of all the necessary costs incurred by the plaintiff in thus perfecting the common title. From the record we cannot see that the defendant was paid or received anything in the present case; and that circumstance is of great weight in the present case; and that circumstance is of great weight in the present case; and that circumstance is of great weight in the present case. Besides the evidence upon the question as to the money received by the defendant in payment for the land, the plaintiff's demand for the park is conflicting. In any view, the plaintiff might be entitled to recover would determine the amount the defendant in fact received. It is not pretended that the defendant that he never did in fact receive of the money corresponding to the Butters' interest, that was one of the reasons, if not the main reason, for refusing the plaintiff's demand. If the plaintiff receive any portion of the money for the Butters' interest, he would not, of course, be liable in this action. These are questions which can only be definitely determined at another trial, as is also the question relating to the Limitations.

Respectfully submitted,
J. McKee, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed March 31, 1881.]

No. 10,600.

PEOPLE, RESPONDENT, vs. AH SING, APPELLANT.

CRIMINAL LAW—INSTRUCTIONS—BURGLARY—RECENT POSSESSION OF STOLEN PROPERTY—JURY—WITNESS. In a case of burglary the Court instructed the jury in substance following: Possession of stolen property, supported by other evidence tending to show guilt, is a circumstance tending to show guilt. In the absence of evidence sufficient to convict, the possession of stolen property is no evidence of guilt. *Held*, not erroneous by reason of the use of the word "strong." An instruction: "If the jury believe that the defendant or any other witness who has testified in the case, has willfully testified falsely in regard to any fact material to the issue in the case, the jury are at liberty to disregard and entirely discard the testimony of such witnesses," etc., is not erroneous. The presumption that jurors have intelligence enough to understand the meaning of ordinary language, and are not misled by its use.

Appeal from Superior Court, Alameda County.

Attorney-General, for respondent.*George W. Lewis*, for appellant.

MYRICK, J., delivered the opinion of the Court.

The defendant was convicted of burglary, and appealed from the judgment and order denying his motion for a new trial. Evidence was given on the part of the prosecution tending to show that a few days after the alleged larceny some of the articles were found in the possession of the defendant and under his control. The defendant testified on his own behalf, that two or three days before the alleged larceny he had borrowed the coat found in his possession from the owner, the complaining witness. He denied having the possession or control of the other articles. Several errors alleged to have been committed by the Court are as follows:

1. The Court instructed the jury:

"Possession of stolen property, unexplained, at a time immediately following the time when the property was stolen, supported by other circumstances and other evidence tending to show guilt, is a strong circumstance tending to show guilt."

It is contended that the error was in the use of the word "strong." In connection with the foregoing instruction the Court also instructed the jury:

"The possession of stolen property, in the absence of other evidence tending to show guilt, is a strong circumstance tending to show guilt."

ufficient to convict, is no evidence of guilt. The be satisfied beyond a reasonable doubt, before onvict, that the defendant and no other person the offense. When the evidence against the de- made up mainly of a chain of circumstances and easonable doubt that one of the circumstances of tial to establish guilt, it is the duty of the jury

ot think that the judgment should be set aside by his instruction. The Court told the jury that the of stolen property supported by other evidence show guilt, was a strong circumstance, but how Court left entirely to the jury to determine. entire charge together, it did not tend to mislead or interfere with their province. The language quite different from that referred to in *People vs. Gow*, 54 Cal. 151.

court instructed the jury:

endant in this action has offered himself as a his own behalf; and in addition to noting his on the stand, and the probability of the truth of nts, taken in connection with other evidence in e jury are at liberty to consider the circumstances ould appear from the evidence under which he testimony, and all the inducements and tempta- y shall appear from the evidence, which would nfluence a person in his situation; and if the jury t the defendant or any other witness who testified has willfully testified falsely in regard to any fact the issue in the case, the jury are at liberty to and entirely discard the testimony of such wit- their further consideration in the case."

no error in this instruction. Section 2061, Sub. , reads: "That a witness false in one part of his s to be distrusted in others." If the witness is usted, of course the jury may disregard and dis- testimony. The Court did not direct the jury to e testimony, but in effect told them, as the law says: If you believe the defendant or any other s testified falsely in regard to any material fact, t liberty, if you find that course consistent with to disregard and discard the entire testimony of s; and it still left the jury at liberty to believe ns of the testimony as should carry conviction to s.

ound to presume that the jury had intelligence

enough to understand the meaning of ordinary language, and that they were not misled by its use.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

IN BANK.

[Filed April 2, 1881.]

No. 6544.

PACKARD, RESPONDENT, vs. JOHNSON, APPELLANT.

EJECTMENT—TENANCY IN COMMON—OUSTER—FINDINGS. In ejectment between tenants in common, plaintiff is entitled to be let into possession unless ousted at a time five years prior to commencement of the action, and the co-tenant has continued in the adverse possession since such ouster. Where the findings of probative facts are not sufficient to enable the Court to declare the ultimate fact, the judgment will be reversed for want of findings upon material issues.

Appeal from the Fifth District Court, San Joaquin County.

J. B. Hall, for respondent.

Budd & Baldwin, for appellant.

McKINSTRY, J., delivered the opinion of the Court:

"Ejectment." In his complaint the plaintiff alleges that he is the owner "of an undivided one-half interest" of, in and to the tract of land therein described.

After certain denials the answer proceeds:

"Further answering said complaint, and as a special defense to said action, defendant avers that for more than five years prior to the commencement of said action the defendant, and those through and under whom he claims, holds and owns, have been in the continuous, actual, open and notorious and exclusive possession of said premises, holding adversely to the plaintiff's pretended right or claim, and holding the actual, open, notorious and exclusive possession of said tract of land and premises, and of every part and portion thereof, adversely to said plaintiff and all comers. Defendant avers that neither the plaintiff nor his ancestors, predecessors or grantors, nor any or either of them, was or were, or have been, seized or possessed of the premises sued for, or of any part or portion thereof, within five years next before the commencement of this action."

No objection has been made to the foregoing as a plea of the Statute of Limitations. Did the Court below find upon the issue thus presented?

It found, in effect, that prior to the twenty-fourth of September, 1860, and from November 15, 1859, the said one Sanor—grantor of defendant—claimed a possession and exercised acts of ownership upon said land, including the demanded premises, as tenants in common; that Sanor then, for a valuable consideration by deed, took and received a deed from one Cocke, whereby he remised, released and quit-claimed to said Sanor the right, title and interest in the lands whereof said plaintiff had theretofore claimed to be the owners in common; that Sanor thereupon went into the open, notorious and exclusive possession of said land, claiming to be the owner of the entirety thereof, under said deed (who had previously conveyed to plaintiff and defendant and plaintiff having prior to that time had possession of said land to the extent of grazing their stock thereon and Sanor within four months after such purchase, to be the owner thereof, built a dwelling house thereon, and enclosed the whole thereof with a substantial fence * * * and said Sanor from and after he built said dwelling-house, and until the time of his death, he, said Sanor, and his wife, lived in said dwelling-house with his family, and was in the open, notorious and exclusive possession * * * keeping the same enclosed and receiving to his exclusive use the rents, issues and profits of the whole, "claiming to be the owner of the entirety thereof."

It further found, that, on the third day of January, 1864, Sanor and wife, by deed, remised, released and quit-claimed to defendant for the consideration of \$1000, all their interest in the land described in the deed, and that on the day of the execution of said deed defendant received possession of the entire premises to defendant, and since been in the sole, open, notorious and exclusive possession of the same, keeping the same enclosed and substantial fence and receiving to his exclusive benefit the entire rents, issues and profits—to be the owner under said deed of the whole

that there is a finding that plaintiff was ousted more than five years before the commencement of the action, and that defendant and his grantor, had been in possession since the ouster; or, a finding that defendant was in adverse possession continuously for more than five years prior to the commencement of the action, that defendant for more than five years prevented

plaintiff from entering into the enjoyment of the premises common with himself.

It is not necessary here to decide whether a "finding" is sufficient if it be as broad as the pleading. In the case before us, the Court below failed to find the material ultimate fact alleged. While the facts found tended to prove adverse possession for the statutory time, yet the facts found did not necessarily constitute adverse possession. The plaintiff was in possession by and through defendant, his tenant, when (as found) defendant determined to assert his claim to be the sole owner. When was plaintiff ousted from the moment defendant began to claim the land as exclusively his own? Not so; but from the point of time when plaintiff became aware of such claim, or (at the very least) from the time when, as a prudent man, reasonably attentive to his own interests, he ought to have known that his co-tenant asserted an exclusive right to the land of which both had had the common possession. The purchase of an outstanding claim of title by Sanor and his quit-claim to defendant (if plaintiff had notice of the purchase and conveyances, which does not appear), the greater or less notoriety of defendant's exclusive claim, his erection of buildings and other improvements, the permanency of the entire profits, the payment of the taxes—and the like—are evidentiary circumstances of more or less weight tending to prove ouster and adverse possession—no more. All of them may have occurred or existed, and yet plaintiff may not have known (or, as a prudent man as aforesaid, may not have been bound to know) that defendant claimed the whole title, and so may not have been ousted five years before the commencement of the action, nor the defendant have had adverse possession for that length of time.

The difference between a finding in a special verdict of an ouster—and of probative facts, which go toward establishing an ouster, was pointed out in *Carpentier vs. Mendenhall*, 28 Cal. 484. It is illustrated in *Carpentier vs. Webster*, 32 Cal. 524—where the occupant refused to let in his co-tenant. In *Carpentier vs. Gardner*, 29 Cal. 160, where it was held that the denial of any title in the co-tenant was evidence of ouster. It has been said that the actual possession of land under a deed which purports to convey the whole thereof, under a belief that it conveys the whole, while in fact it gives title to an undivided portion only, is not an ouster of a tenant in common who owns the other undivided part. (*Seaton vs. Seaton*, 32 Cal. 481.)

The findings in the record are not of such probative force

the Court to declare that the ultimate fact of admission necessarily results from them. (*Coveny vs. L.* 552.)

and order reversed and cause remanded for a

ar: Thornton, J., Morrison, C. J., Myrick, J., J.

in the judgment: Ross, J.

DEPARTMENT No. 2.

[Filed April 8, 1881.]

No. 6629.

E, APPELLANT, vs. BROGAN, RESPONDENT.

UPREME COURT. The Court below excluded evidence offered tiff. The Supreme Court held such exclusion improper, and the judgment and remanded the cause for a new trial: *Held*, motion by plaintiff in the Supreme Court for a judgment in his uld not be granted.

from the Twenty-third District Court, City and San Francisco.

od, for appellant.

lor, for respondent.

, J., delivered the opinion of the Court:

is made by the plaintiff to modify the judgment e, heretofore rendered by this Department on e appeal reversing the judgment of the Court below. n was instituted to enforce a street assessment; trial in the District Court the affidavit of demand the eleventh Section of the Act of 1872 (Stats.) was excluded, as insufficient to prove such de-

t found as a fact that no demand was ever made. ecessarily have been so, as the bill of exceptions there was no evidence of demand before the Court idavit was excluded.

g above stated was excepted to by the plaintiff, urt held that the Court below erred in exclud- lavit, reversed the judgment and remanded the new trial.

s motion is to modify the judgment rendered ering the Court below to enter judgment for the

plaintiff. It is argued that, the Court having ruled that the affidavit was improperly excluded, therefore this Court should treat it as if it were in and the demand properly found, of which it is conclusive evidence; and as then the plaintiff would be entitled to a judgment, the Court should order judgment to be entered as moved for.

This would be to convert this Court into a Court of original jurisdiction. We would then be trying the case on the evidence, which would be an usurpation of power. The evidence is not before us, for the reason that it was ruled out. The Court below excluded the offered testimony, and passed on the case without it. The case comes here to have the error corrected, and the Court below directed to admit the excluded evidence for the purpose of having a proper trial of the issues between the parties. But the plaintiff in effect requests us to let in the evidence and try the case here. This we have no authority to do.

If this motion was granted we should direct the Court below to enter a judgment for the plaintiff on findings which show the defendant entitled to judgment—for the finding is distinct that no demand was ever made. Such demand was essential to a recovery, and the Court finds that there was none. Judgment for defendant follows as a matter of course. The record in the Court below, if the modification asked for was made, would show a most illogical result—a judgment rendered for the plaintiff on facts established definitely by the findings, showing that the defendant is entitled to the judgment. Judgments of Courts appealed from are sometimes reversed in this Court on the findings as insufficient to sustain the judgment, and a judgment rendered here for the appellant; but it is only where the judgment is not the deduction from the facts found, which the application of the rules of law for the admeasurement of the rights of the parties, indicate as the proper judgment. In other words, the only tribunal authorized to find it, has found the minor premise (the facts of the case) correctly upon the evidence before it; but in applying the major premise, the law, to the minor, has drawn the wrong conclusion, upon which a judgment has passed not justified by the rules of law. The result reached by the conclusion and judgment in such cases is illogical. The facts found show that the judgment does not follow as a logical conclusion from them. The law has suffered, and this Court can redress the injury and correct the error by ordering the proper judgment to be entered. The record in the Court below was illogical, and therefore illegal before, and after correction it is legal and logical. But

to make it logical, if the judgment is modified as the findings of fact must be changed. This Court has to perform such an act.

view this Court did not rest its judgment on the fact that the evidence was insufficient to justify the decision passed on no such question. No such question was

How can it be said that any such question was presented when the bill of exceptions shows that all evidence in demand was excluded? If there was no evidence presented, and the Court could only find as it did, that no error was made, so that this Court could not, under such circumstances, hold that the evidence was insufficient to sustain the demand.

Each point had been before us for adjudication, and we came to the conclusion that it was well taken, the error that have been reversed for the same reason as in the case of case discussed above, in order that the only authorized tribunal—the Court below—might try the

motion was in effect decided in passing on the same time ago. This opinion gives the reasons for the decision on the motion.

The foregoing indicates that the motion must be denied, and is ordered accordingly.

Cur: Morrison, C. J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 1, 1881.]

No. 6210.

OS, RESPONDENT, vs. MERRILL, APPELLANT.

DECIDED. Through inadvertence, the Court below failed to allow the respondent the full amount, a credit as shown by a stated account of the plaintiff's: Held, the judgment must be reversed, with directions to the Court below to allow the full amount of the credit.

From Twelfth District Court, City and County of San Francisco.

Harrison, for respondent.

Carpstein, for appellant.

The Court delivered the opinion of the Court:

It is the opinion of the Court that the findings of fact are not sustained, and the judgment is not well taken. From the findings it ap-

pears that the plaintiffs are stockbrokers, and as such, from time to time between the sixteenth of May, 1873, and the fourteenth of May, 1875, at the request of defendant, bought and sold for him various stocks, and paid out for him various sums of money. On the thirtieth day of September, 1875, plaintiffs and defendant had an accounting of the different transactions between them, and of the moneys paid out by the plaintiffs for the defendant; and upon such accounting it was found and agreed by the respective parties that the amount of \$8,098.70 was the balance due to the plaintiffs from the defendant. Afterwards the plaintiffs paid out for the defendant, at his request, the following sums of money to wit: \$50 on the second of November, 1874; \$1,000 on the thirtieth of November, 1874, and \$200 on the nineteenth of March, 1875.

On the fifth of January, 1875, the plaintiffs held, as security for the said indebtedness, 500 shares of the capital stock of the Silver Hill Mining Company belonging to the defendant. On that day defendant gave to the plaintiffs written instructions to sell the stock at their discretion for his account. Pursuant to these instructions, the plaintiffs, on the seventh day of January, 1875, sold 400 shares of the stock for \$7,600, deducted their commissions therefrom, amounting to \$300, and placed the balance—to wit, \$7,562—to the credit of the defendant; but, by some mistake in the Court below, the defendant in lieu of this was only allowed a credit of \$6,800. Instead of the sum last mentioned he should have been allowed a credit of \$7,562, as of date January 7, 1875.

On the fourteenth of May, 1875, the plaintiffs sold the remaining 100 shares of the stock for \$962.50, deducted therefrom their commissions, amounting to \$4.81, and placed the balance, \$957.69, to defendant's credit. The stock had a fixed market value, and the plaintiffs, in making the sales they did, acted as they thought would best promote the interest of the defendant. The plaintiffs must be credited with the amounts paid out by them for the defendant, and must be charged with the amounts received by them on his account, and are entitled to judgment for the excess of the former over the latter, with legal interest thereon. The order denying the motion for a new trial must be affirmed; but the error occurring in the item of January 7, 1875, the judgment must be reversed and the cause remanded to the Superior Court, with directions to modify the judgment as herein indicated.

Ordered accordingly.

We concur: McKinsty, J., McKee, J.

DEPARTMENT No. 1.

[Filed April 1, 1881.]

No. 6604.

GEORGE McDONALD, APPELLANT,

VS.

SAN M. McELROY ET AL., RESPONDENTS,

ADMINISTRATION—HEIRS.—The ancestor of defendants executed of land, with a covenant for a right of way over another part of land. After proceedings in administration, the land over the right of way was claimed was distributed to defendants. Action was for specific performance of the covenant. *Held*, that in order to bind the defendants (heirs) they should have been named in the covenant; that the words of the covenant, "said street forever and remain free and open as a public street," if they constituted a covenant—were either a covenant of seizin—in which case there was breach so soon as the covenant was executed, or they were a covenant in the nature of warranty or for quiet enjoyment; in which case the covenant was not broken until the assertion of paramount title and legal right. Under the Act of 1855, heirs were made liable upon the covenant of their ancestor to the extent of the land descended to them through the machinery of the Probate Court. A claim for a breach of such covenant had to be presented as an action against the estate.

from Nineteenth District Court, San Francisco.

W. & Bergin, for appellant,

Boyd and Blake, for respondents.

CHIEF JUSTICE, J., delivered the opinion of the Court:

Complaint alleges that on the 27th day of October, 1875, James McElroy, since deceased, in consideration of the sum of seven hundred dollars, paid to him by plaintiff, executed a deed of that date, grant, bargain, sell, alien, release, convey and confirm unto plaintiff, his heirs, assigns and administrators all that certain parcel of land situated in the City and County of San Francisco, particularly described as follows: "Commencing on the southeasterly corner of Minna street at a point distant one hundred and sixty feet from the line of said street; thence running northeasterly from the northeasterly line of said street twenty-two feet eight inches; thence at right angles southeasterly eighty feet; thence at right angles northeasterly twenty-two feet eight inches; and thence at right angles northwesterly eighty feet to said southeasterly corner of Minna street at the point of commencement; together with the right of way in, upon, and over a street twenty feet in width, called Minna street, running from

Tenth street to the southwesterly line of the lot of land, and thereby conveyed (to wit, said last-described parcel of land) said street forever to be and remain free and open as a public street.

The complaint further shows that at the time the said James McElroy sold and conveyed as above, he was in possession and seized in fee "to the extent of one undivided sixth part" of a tract of land over and through which Minna street—was to be kept open (as by McElroy "covenant") from Tenth street to a transverse line running across the proposed Minna street, eleven feet four inches distant northeasterly from the line of the lot so as above sold and conveyed by James McElroy to plaintiff; and that for the said distance of eleven feet four inches, the said James McElroy was, at the time of said sale and conveyance, the sole owner of the land through which the proposed Minna street was to run.

The complaint further alleges that after the death of James McElroy, and before the estate of the said James McElroy was distributed, one John McDermott, one of the tenants in common in the tract of land in which James McElroy, in his lifetime was so, as aforesaid, the owner of an undivided one-sixth part, instituted an action in the District Court of the Nineteenth Judicial District for said County and County against all of the tenants in common of said tract (including the defendants herein, who are the widow and children and lawful heirs of James McElroy, deceased) and that such proceedings were had therein, that a final decree of partition was made; that by said decree a tract of land, which includes the proposed Minna street for a distance of sixty-three feet six inches (immediately adjoining to and to the northerly of the eleven feet four inches exclusively owned by said James McElroy in his lifetime) was assigned and allotted in severalty to the defendants in the present action, as the part and share of said tract to which the heirs of said McElroy were entitled in severalty.

The complaint further alleges that at the time of the conveyance by James McElroy to plaintiff, seven hundred dollars (the consideration therein named) was the full, fair and just value of the land conveyed, with said street and right of way conveyed therewith, as aforesaid, but without said street and right of way said land was not worth said sum and was wholly without means or way of ingress or egress from or to any public street or highway.

That, January 17th, 1871, said James McElroy died intestate in said city and county, whereof at the time of his

as resident, leaving real and personal estate situated, and leaving him surviving defendant, Susan his widow, and the other defendants, his surviving and lawful heirs; that upon petition and proceedings thereupon, and February 3, 1871, the Probate Court of said city and county duly granted letters of administration on the estate of said deceased to said Susan, aforesaid, who duly qualified and entered upon the performance of her duties as administratrix; that due notice to said claimants was had, etc. And afterwards, and in 1876, by decree of said Probate Court, the estate of said James McElroy, deceased, was distributed as follows: To Susan McElroy one-third part, and to Anna M., Jennie, Emma, Mary E. and James McElroy, each two undivided fifteenths parts of the foregoing estate—(Describing two tracts, one tract being therein referred to as including eleven feet four inches of the proposed Minna street, and the other being referred to as lying to the side of the said James McElroy, deceased, by the decree of partition).

The complaint also alleges that on January 27, 1876, Susan McElroy, by the decree of said Probate Court, finally resigned her office of administratrix and administration of the estate closed, and that all the property of which James McElroy died seized was community property of James McElroy and his wife, the said Susan. Further, the complaint alleges, since the decree of distribution, have returned to the said defendants respectively of the land distributed to them. The complaint further avers that at the time of the execution of said deed of conveyance by said James McElroy, "said Minna Street was not an open public highway, extending from the parcel of land conveyed by said James McElroy, to said Tenth Street, or for any part of said street, or at all; and there is not and never has been a street, or any street or way at all, in, upon, over, or along the whole or any part of said Minna Street, as in and to the said deed described, and agreed forever to remain an open highway; but although there is not and never was any street, as last stated, the property owners adjoining the said parcel of land suffered and permitted plaintiff to freely use the same for his lands to said parcel of land of plaintiff, and to the public highway, up to within the past six months;" that since he has been forbidden ingress from his land to the public streets and highway, he has requested defendants to open said parcel of land as in said deed described, or otherwise to afford

plaintiff means of ingress and egress, but said defendants, although often requested, have refused, etc.

The special prayer is that the defendants be compelled specifically to perform said covenant, and to open said Street to the extent and in the manner in said deed of conveyance described; and this is followed—in the event of granting of the specific prayer not being practicable—by a general prayer that plaintiff have such other and further relief as shall seem meet, with costs, etc.

To the complaint the defendants severally demurred on the ground that the same did not state facts sufficient to constitute a cause of action.

The District Court sustained the demurrer, and the plaintiff not being amended, final judgment was rendered and entered that plaintiff take nothing by his action, and the defendants have and recover their costs, etc.

This appeal is from the judgment.

Many curious and interesting questions are suggested by the demurrer—some of which were argued with much ability and ingenuity. But, in the view we take of the case—if appellant is entirely right with respect to the position him assumed—the demurrer was properly sustained. The conveyance from James McElroy to plaintiff is not set out in full length in the complaint. The averment at the commencement of the pleading is that "James McElroy, since deceased, did, by his deed of a certain date, bargain, sell, and convey unto plaintiff, *his* heirs," etc. Nowhere in the complaint is there an averment that James McElroy ever attempted to bind his heirs by any covenant. The words "said land forever to be and remain free and open as a public street" if they constitute any covenant—are either a covenant of seizin, in which case there was a breach so soon as the covenant was executed (since the grantor had no title to the right of way, nor any which could affect the rights of the co-tenants in the lands, over which the way was to run), or they were a covenant in the nature of warranty, or for enjoyment, in which case the covenant was not broken, and the assertion of paramount adverse and legal right. The words quoted are a covenant of seizin, on which the grantor became liable when the deed was executed, the plaintiff for the breach should have been presented to the administrator of the estate of James McElroy. As the law was when the deed was executed, and at the death of the grantor, the heirs became answerable upon the covenant to the extent of the land descended to them "in the case prescribed by law." (Statutes 1855, p.

and personal property of a decedent were made law for the satisfaction of *all* claims or demands against the deceased at the time of his death. To assets of the estate, however, the claim had to be required by the provisions of the Code of Civil relating to the settlement of the estates of decedents. (*Hartman vs. Lee*, 30 Ind. 281.) If, on the words cited from the deed are to be covenant to warrant and defend covenantee in the right of way against all lawful objectors, or covenantee quietly enjoy the use thereof undisturbed by obstruction, and the breach occurred after the death of the grantor (and assuming the question not to be governed by any statute of this State), the heirs are not bound by the deed. (Decedent expressly covenanted that they should be bound by common law to make the heir responsible it was not required that he be expressly named in the bond or covenant for. (2 Wait's Actions and Defenses, 397.) And against him as heir an averment was necessary that he be named in and bound by the bond or covenant. The rule as to the ancient warranty. (Rawle on Feudal Tenure or Title, 4th ed., p. 461; Co. Litt., 384.) "If a covenant is made for himself and his heirs, the heirs are bound to perform it." (2 Bla. Com. 304.) "A covenant may be made for its object something annexed to or inhering in land or other real property; although it may be purely personal to the covenantor, and his heirs and representatives, because he has omitted to name his heirs. A covenant, though clearly personal, or relating to a thing, may be a covenant real, because the heir of the covenantor, will be liable in respect of assets by decedent," (2 Bl. on Covenants, 63.) To create liability on the part of the heir it is requisite that the terms of the covenant provide for its performance by him. (Id., 449.) In the complaint before us it is not stated, even by way of example, that James McElroy covenanted that his heirs should be bound. The word heirs was not necessary under our law to create or convey an estate in fee simple. (Stats. of Cal., § 11.) But there was no statute which made the heir of the covenantor liable for the covenants of the covenantor except the statute, which applied all assets to the payment of the decedent's debt—through the machinery of the executor. The very basis of plaintiff's claim here is that the obsolete law does not affect his right to maintain the action.

It is affirmed.

For: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 23, 1881.]

No. 6759.

FORBES, RESPONDENT,
vs.

JAMES REILLY ET AL., APPELLANTS.

EJECTMENT—OUTSIDE LANDS—FORMER JUDGMENT.—In a former action brought by plaintiff against Turner, Reilly, Selby (Mayor of San Francisco) and the City and County of San Francisco, it was judged that all the steps necessary to acquire a conveyance from the city to certain "outside lands" had been complied with on the part of Reilly, who was predecessor of Turner; that the Board of Supervisors awarded the land to the latter, and that the publication required was fully made; and that plaintiff was the successful party in interest of Turner. The Court decreed in that action that the Mayor should convey the city title directly to plaintiff. The defendants (other than Reilly,) never made any application for the land, nor commenced any proceedings against Turner or Reilly during the period of publication, or paid taxes or assessments on the property, or complied with any of the requirements of the ordinances or statutes on the subject: *Held*, in this action of ejectment, plaintiff was entitled to recover.

Appeal from Fourth District Court, City and County of San Francisco.

B. S. Brooks, for respondent,

E. A. Lawrence and *J. M. Seawell*, for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

The decree in the action of *Alexander Forbes vs. George Turner, James Reilly, Thomas H. Selby, Mayor, etc., and the City and County of San Francisco*, must be read in connection with the pleadings. From the judgment roll it appears that it was therein necessarily adjudicated that all the requirements of the Act of Congress of March 8, 1866, of the ordinances of the city, and of the Acts of the Legislature relating to the subject, had been fully complied with by, or on behalf of James Reilly; that the land in controversy in the present ejectment had been awarded by the Board of Supervisors to Turner as successor in interest or representative of Reilly, and that the publication required by the ordinance and act of the Legislature had been fully made.

In *Forbes vs. Turner et al.*, it was decreed that the Mayor should convey the city title directly to Forbes. It is now urged by the present defendants and appellants (other than Reilly), that the deed of the city in pursuance of such decree

a contravention of the trust with which the city
 le, and is, therefore, void. As we have seen in
Turner et al., it was adjudicated—as against the
 was a party—that Reilly, or his successor, had
 ed the land by the proper municipal authority.
 tended that these defendants (other than Reilly)
 any application for the land, or that they com-
 proceedings against Turner or Reilly during the
 e publication, or that they paid taxes or assess-
 complied with any other of the requirements of
 ces or statutes. If, then, the city deed had is-
 ner, the present defendants would have had no
 n action brought by him for the recovery of the
 The rights of Forbes supervened upon those of
 he latter would have been entitled to the city
 at the expiration of the publication, except that
 conveyance was diverted to the former by the decree
 ent Court—it appearing that he had acquired the
 which had been recognized and established to the
 of the Board of Supervisors, and on which the
 en awarded to Turner.

plaintiff stands here precisely as if the Court had
 ne deed to issue to Turner, and had compelled
 rey the land to plaintiff. The decree directing
 be made directly to the present plaintiff, did not
 h the trust estate, except to direct a conveyance
 h the terms on which the city held it.

and order affirmed.

r: Ross, J., McKee, J.

District Court of the United States,

IN AND FOR THE DISTRICT OF CALIFORNIA.

AUGUST TERM, 1880.

No. 221.

MAINWALD, ASSIGNEE IN BANKRUPTCY, ETC.,

VS.

HARRIS LEWIS.

IN EQUITY.

al decree.

rittenden, for plaintiff.

ighten, for respondent.

HOFFMANN, J.:

This cause came on to be heard at this term, and was argued by counsel: and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

First. That the judgment of the District Court of the Nineteenth Judicial District of the State of California, in and for the City and County of San Francisco, in the action in said Court entitled "H. Lewis, plaintiff, vs. Louis S. Schoenfeld, Simon Cohen, and Isaac Newman, defendants," which was rendered and entered and recorded on or about the seventeenth day of January, A. D. 1877, being the judgment mentioned and described in the plaintiff's bill in this cause, was procured and obtained by said Harris Lewis, respondent herein, by fraud and collusion, and was, and is, a fraud upon and against said Simon Cohen also upon and against the said firm of Schoenfeld, Cohen & Co., also upon and against the creditors of said firm of Schoenfeld, Cohen & Co., and also upon and against the complainant, said Herman Shainwald, as Assignee in Bankruptcy, of the said Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, Bankrupts.

Second. That said judgment of said Nineteenth District Court of the State of California, and also the entry and recording of said judgment, be and the same and each of the same is, are hereby declared, adjudged, and decreed null and void, of no effect.

Third. That said action in said District Court of the Nineteenth Judicial District of the State of California, the writ of attachment and the writ of execution issued therein, each and every levy and all levies made on, or under, or by virtue of said writs, or of either of them, the sale under said writ of execution by the Sheriff of the City and County of San Francisco, the chase and purchases made at said sheriff's sale, by said Harris Lewis, respondent herein, the order made and rendered by said District Court of the Nineteenth Judicial District of the State of California denying the application of said Simon Cohen and Louis S. Schoenfeld for an order vacating and setting aside said judgment, and each, all, and every of the proceedings in said action, was and were commenced, had, done, taken, obtained, and procured by and through fraud and collusion on the part of the said Harris Lewis and of his agents and attorneys, and with the intent, object, purpose, and design of cheating and defrauding the creditors of said firm of Schoenfeld, Cohen & Co., in pursuance of a secret, illegal and fraudulent combination, conspiracy and agreement between said Harris Lewis, Louis Schoenfeld and Isaac Newman to defraud the creditors of said firm; and said action and the aforesaid writs, levies, sales, chases, and orders, and each, all and every proceeding and proceedings in said action, is and are hereby declared, adjudged and decreed to be a fraud upon and against said Simon Cohen

l against the said firm of Schoenfeld, Cohen & Co.,
d against the creditors of said firm of Schoenfeld,
and also upon and against the said Herman Shain-
signee in Bankruptcy of the firm of Schoenfeld,
, and of Louis S. Schoenfeld, Isaac Newman and
n, Bankrupts, and is and are hereby declared,
d decreed null and void, and of no effect.

That the said District Court of the Nineteenth
istrict of the State of California, did not acquire any
n said action, over said Simon Cohen, and the judg-
it of execution therein and all proceedings thereon,
e, and each and every one of them is, null and
at of jurisdiction in or on the part of said Court
on of said Simon Cohen.

at the \$17,000, \$8,000, and \$5,000 promissory notes
nd described in the complainants' bill herein, and
said Harris Lewis obtained said judgment in said
t of the Nineteenth Judicial District, of the State
a, were, and each of them was, manufactured and
said Louis S. Schoenfeld and Isaac Newman to
Lewis, and was and were procured and received by
fraud by and on the part of said Harris Lewis
consideration being paid therefor to said firm of
Cohen & Co., and with the intent, object, and design
defraud the creditors of said firm, and in execution
said combination, conspiracy and agreement; and
es are, and each of them is, hereby declared, ad-
decreed to be null and void, and the said Harris
reby ordered to deliver and surrender each, all, and
said promissory notes to said Herman Shainwald,
s aforesaid, within five days.

hat all the money and property of the firm of
Cohen & Co., which was received or obtained pos-
y the respondent, Harris Lewis, on or subsequent to
of June, A. D. 1877, by or through any purchase at
or from William H. Bremer, Isaac Newman, Louis
d, or from any other person, was and were obtained
f, delivered to, and received by him, by and through
y and through an illegal and fraudulent combina-
nspiracy between said Harris Lewis and the said
an, Louis S. Schoenfeld, and other persons, to cheat
the creditors of said firm of Schoenfeld, Cohen &
e said respondent Harris Lewis is hereby declared,
nd decreed to be a trustee for the benefit of the
said firm of Schoenfeld, Cohen & Co., and for the
id Herman Shainwald, as assignee in bankruptcy of
d of the individual members of said firm as afore-
the money and property of said firm as received,
, or obtained possession of by him, the said Harris

Lewis, and also of any and all interest, profit, profits, in and proceeds made, secured, obtained, or in any way, or manner or form, realized by him, the said Harris Lewis, by or through or by means of the use of said money and property, or any part thereof, or by the use of any such interests, profits or proceeds, and the said Harris Lewis is hereby declared, adjudged and decreed to be a trustee of the sum of eighty-one thousand four hundred and twenty-five and 7-100 dollars, in lawful money of the United States, for the benefit of said Herman Shainwald assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co. and of Louis S. Schoenfeld, Isaac Newman, and Simon C. Bankrupts, the same being the aggregate amount of the moneys and property of said firm received and obtained by the respondent as aforesaid by fraud and collusion before the first day of November, A. D. 1877.

Seventh. That the complainant, Herman Shainwald, recover from the respondent, Harris Lewis, and that the respondent, Harris Lewis, forthwith pay to the said Herman Shainwald complainant herein, the sum of eighty-one thousand four hundred and twenty-five and 7-100 dollars, and the further sum of seventeen thousand and ninety-one and 26-100 dollars interest on the aforesaid sum of eighty-one thousand four hundred and twenty-five and 7-100 dollars from the first day of November, A. D. 1877.

Eighth. That the injunction heretofore issued in this suit on the eighteenth day of November, A. D. 1879, be and the same is hereby made and declared to be perpetual.

Ninth. That the complainant, Herman Shainwald, as assignee as aforesaid, recover from the respondent, Harris Lewis, that the respondent pay to the complainant all the costs and disbursements by said complainants incurred or paid out in this cause, the same to be taxed by the clerk of this Court.

Tenth. That the writ of injunction issue forthwith out of this Court commanding the said Harris Lewis, his agents, attorneys, servants, and assigns, to cease, desist, and refrain forever from claiming or asserting any right to said judgment, or to any part thereof, or levy of execution, or to any order, relief, or other proceeding in the said action in the said District Court of the Ninth Judicial District of the State of California, and from prosecuting said action or taking any other or further proceeding therein, and from issuing or procuring to be issued therein, any writ or other process, mesne or final, and from doing any other act or thing therein and from assigning, transferring, or otherwise disposing of said judgment or any part or portion thereof, and from asserting or setting up in any way, manner or form, any claim, right, title, interest, or ownership of, in, or to the promissory notes for \$17,000, \$8,000 and \$5,000 herein-above mentioned, or of, in, or to any or either of them.

November 5, 1880.

ic Coast Law Journal.

APRIL 23, 1881.

No. 9.

Current Topics.

Many inquiries made respecting it, the Bar does not seem to be aware of the fact that no case has ever been filed in the case of *Leonard vs. January*, involving the validity of the County Government (filed in 1880), filed September 16, 1880. Our Supreme Court rendered a decision in the matter, promising to file an opinion on an early day. The decision is in the following

IN BANK.

[Filed September 16, 1880.]

No. 7334.

LEONARD vs. JANUARY.

COURT (Thornton, J., and Myrick, J., dissenting):
of the opinion that the Act of the Legislature en-
Act to amend Sections four thousand (4000), four
and three (4003), four thousand and four (4004),
and and six (4006), four thousand and twenty-two
thousand and twenty-three (4023), four thousand
four (4024), four thousand and twenty-five (4025),
and and twenty-six (4026), four thousand and
t (4028), four thousand and twenty-nine (4029),
and and forty-six (4046), four thousand and eighty-
, four thousand one hundred and three (4103),
hundred and four (4104), forty-one hundred and
, forty-one hundred and fifteen (4115), forty-one
d sixteen (4116), forty-one hundred and nineteen
y-one hundred and sixty-five (4165), forty-one
l ninety-two (4192), forty-two hundred and four
y-two hundred and twenty-one (4221), forty-two
l fifty-six (4256), forty-three hundred and four-
, forty-three hundred and twenty-eight (4328),

were authorized to find that Holbert borrowed money the strength of credit created entirely by his separate erty. There was nothing to show that the borrower intended to allow a debt to be created other than one of the ordinary character, for which the whole estate was liable according to law, as in case of other debts. The instruction was absolute and tended to mislead the jury.

It may be that if Holbert had borrowed the money from Johnson with the distinct understanding between them that the separate property of Holbert was to be liable for the debt created, and the funds so borrowed had gone to pay for the land purchased, the land would have been the separate property of Holbert; but no such case is before us.

At a subsequent day to which further hearing had been postponed, the defendants offered in evidence to the court the will of Frances Holbert, showing Louisa Lynn to be the sole devisee of said Frances; the petition of E. M. McCarty, administrator of the estate of Frances Holbert, praying that the share of the estate of James Holbert belonging to Frances Holbert be set over to him, alleging that the debt of James Holbert had been paid, and that the property was common property; the objections to the petition by the administrator of James Holbert, and the findings of the court upon the hearing of the petition and objections, which findings were the same before referred to. The Court refused to receive the testimony.

We cannot see that the defendants were prejudiced by the ruling. The petition, objections and findings alone were offered. It does not appear that any decree had ever been rendered upon the findings. The only purpose of the petition was to show an estoppel; and as no judgment had been rendered, we cannot see that there was any estoppel. There can be no estoppel by verdict or findings of fact until a judgment or decree has been entered upon such verdict or findings (2 Smith's Lead. Cas. 826, ed. of 1866, *Duchess of Kingston's case*.) This is true, even though the Court had no jurisdiction to try the matter and make the findings.

We think the Court erred in giving the instruction as stated as having been given. We also think that the evidence did not justify the verdict.

Judgment reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., Thornton, J.

I concur in the judgment upon the ground that the instruction referred to by Mr. Justice Myrick was error: Kinstry, J.

I concur in the judgment: Sharpstein, J.

[Filed April 13, 1881.]

No. 10,609.

THE MARY MAGUIRE ON HABEAS CORPUS.

LAW—SEX ORDINANCE. A law disqualifying a person from engaging in a lawful business must apply to both sexes alike. The defendant was arrested on a charge of having violated an ordinance of the city of San Francisco (commonly known as the Dive Ordinance) providing that "every person who causes, procures or employs any female to be, or in any manner attend on any person in any dance-hall, bar, or in any place where malt, vinous or spirituous liquors are used, and every female who in such place shall wait or attend on any person, is guilty of a misdemeanor." *Held*, that such ordinance is not in violation of Article 22, Section 18, of the Constitution, which provides that "No person shall, on account of sex, be disqualified from employment or pursuing any lawful business, vocation or profession."

ran, for petitioner.

root, contra.

... J., delivered the opinion of the Court:

quire petitions for a discharge from custody upon which she was arrested on a charge of having the following ordinance passed by the Board of Supervisors of the City and County of San Francisco, and approved by the Mayor in March, 1880:

§ 32. Every person who causes, procures or employs a female to wait, or in any manner attend on any dance-cellar, bar-room, or in any place where any spirituous liquors is used or sold, and every person, in such place, shall wait or attend on any person, a misdemeanor.

erson owning or having charge or control of any cellar, drinking saloon, or drinking place, or any malt, vinous or spirituous liquors are sold or suffer or permit any female to be or remain in any cellar, saloon or drinking place between the 10 o'clock P. M. and 6 o'clock A. M. No female shall be in such drinking cellar, saloon or place between the hours of 10 o'clock P. M. and 6 o'clock A. M.; *provided*, that this section shall not be construed to apply to hotels or restaurants, or grocery stores, or to the wife or daughter of the proprietor may happen to be present; or to public gardens, or to balls that are not held in drinking saloons or bar-rooms; *provided*

iving existed in the manuscript from which the above entitled decision was
 corrections will be noted: At page 358, line 10 from top, for "Article XXII"
 same p., 34th r. from bottom, the sentence beginning with "Waterbury" should read:
 the verb DISQUALIFY, of which DISQUALIFIED is the past participle," etc. At same
 above, for "properties" read properties. At: 359, 3d line from bottom, 2d
 277. At p. 360, 3d c., ending "all since passed," should be followed by citation,
 citation, 34 Cal. 243." At same p., last "10th line, strike out word "an." At p.
 361, 5th line, after "without" insert

further, that if the ball is given for the purpose of evading the provisions of this order, then this order shall be applied.

The particular offense with which the petitioner is charged is that of waiting on persons in a bar-room where liquors were sold. The offense is against the provisions of the ordinance in the ordinance as given above, and what is herein relates to that portion of the ordinance only.

The discharge of the petitioner is claimed on the ground that the ordinance above mentioned is void, as being in conflict with Section eighteen (18), Article XXII, of the Constitution of this State, which is in these words:

"No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession."

It is not asserted or claimed that the business in which she is engaged is not a lawful one, except for the ordinance in question, and the provisions of Section 306, Penal Code.

Is the ordinance in question in conflict with the quoted section of the Constitution?

It becomes then necessary to inquire in what sense the word "*disqualified*" is used in this section. It is presumed to be used in its natural and ordinary sense, unless there is something in the instrument which shows the contrary. (*Weil vs. Kenfield*, 54 Cal. 113.) The rule on this subject is thus stated by Marshall, C. J., in *Gibbons vs. Ogden*, 4 Wheat. 188. The framers of the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have intended." (*Cooley's Const. Lim.* 72.)

We find nothing in the Constitution which shows that the word is used in the section above considered in any sense other than its natural and ordinary sense.

What then is its ordinary and popular sense? Webster defines the verb *disqualify* as the past participle as follows:

"1. To deprive of the qualities or proprieties necessary for any purpose; to render unfit; to incapacitate; to disable with *for*."

"2. To deprive of a legal capacity, power or right; to disable, as a conviction of perjury disqualifies a man to be a witness."

(See same word in Worcester's Dictionary.)

In our opinion the natural and ordinary sense of *disqualify* is to incapacitate; to disable; to divest or deprive of qualifications; and that it was used in this sense in the section in question.

The language of the ordinance is plain, and its meaning

able. It leaves nothing for construction. The employed in this ordinance *incapacitate* a woman from the business for which the petitioner was fined, by her from doing so. This being so, she is disqualified by the ordinance under consideration from pursuing business lawful for men. We are compelled to admit that while the Legislature cannot disqualify a woman on account of sex from following a lawful business by enactment, it may by indirection accomplish the purpose by forbidding, under a penalty, the prosecution of business. Such legislation as that just above introduced could only be considered an evasion of the constitutional provision. Such an enactment would be as much a violation of the paramount law as one disqualifying by express enactment a woman offending would be liable to the penalty if she was so employed. This would usually be considered as disabling, as imposing a disqualification, and as disqualifying.

It is further contended that the inhibition or disqualification is not on account of sex, but on account of its immorality.

That such employment of a woman is of a vicious character and hurtful to sound public morality, and that this is the object and design of the ordinance. It is not contended that such business is *malum in se*, but of a hurtful character and tendency. It may be admitted that such is its character and design, but this object is aimed to be accomplished by an ordinance which precludes a woman from a business. It is said that the presence of women in a place has this tendency. If men only congregate, this tendency does not exist in so hurtful a degree; at any rate, it is not so regarded so hurtful, and has not fallen as yet under a legislative ban. So that it comes at last to this: that the exclusion and disqualification is on account of sex. In effect said above, the attempt is thus made to accomplish the purpose by indirection which cannot be done directly. The law of the land annuls all such enactments. (*Cum v. Missouri*, 4 Wall, 227; *People vs. Albertson*, 55 N. H. 201; *Taylor vs. Commissioners of Ross County*, 23 Ohio, N. H. 201.)

It is contended that this is nothing more than the exercise of the police power, which is vested in the city and county by Section 1, Article XI of the Constitution. But is this proposition a restriction to the police power in the Constitution? The restriction of the section we have been examining

is at the meaning of the Constitution, as of any

other writing, the whole of it must be examined. If there is an apparent conflict, it is the duty of Courts to harmonize them, if it can be reasonably done, so as to give effect to every portion of the instrument. It is not to be supposed that an instrument of this character, every section of which was fully considered, has been framed with contradictory provisions. What was provided in one section may be restrained by the provisions of another.

The Section 18 of Article XX imposes a restraint on every law-making power in the State, whether an Act of the Legislature or an ordinance or by-law of a municipal corporation. It is a positive declaration, made by the sovereign authority, that whatever may be done under the legislative power, in any and every shape or form, shall never, by direct or indirect action, incapacitate any person on account of his or her sex from entering upon or pursuing any lawful business, vocation or profession. This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the Senate and Assembly. Both grants of power are alike made by the Constitution, and both are alike restricted by this section of Article XX.

It may be further said of it that it is prohibitory in character, and needs no legislation to make it active in effect. It is self-executing, and struck with nullity all laws in existence inconsistent with it, as soon as the Constitution went into operation, and all since passed.

We have carefully weighed the arguments addressed to us on the point of immorality. But we must presume that these considerations were discussed and weighed by the Convention which framed the Constitution and the people who adopted it, that they fully considered on the one hand the benefits which would spring from the adoption of a policy like that established by the section, and the bane on the other, and that on a just and fair balancing of the results of good and evil, they determined to have the section as it is, fixing and carrying out a policy, as in their judgment the best under the circumstances. As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either direct or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation or profession permitted by law to be entered on and pursued by those sometimes designated as the stronger sex. To adopt any conclusion to which the reasoning of the counsel for the people would lead us would be, in our judgment, to insert an exception to the general rule prescribed by this section.

no exceptions in this section, and neither we or power in the State have the right or authority to, whether on the ground of immorality or any other. All these are considerations of policy, the determination of which belonged to the convention framing, and in adopting, the Constitution, and their final and judgment has been expressed and entered in the unmistakable language of the Constitution itself, the rule as above stated. The policy of the ordinance is inconsistent with policy intended and fixed by the Constitution. They cannot both stand.

The Constitution furnishes a rule for its own construction. It is that its provisions are "mandatory and prohibitory" by expressed words they are declared to be so. (Article I, Section 22.) We find no such exceptions in the Constitution. This rule is an admonition to us, the highest laws in this State, that its requirements are not meaningless, but that what is said is meant—that we mean what we say." Such is the declaration of the highest sovereignty among us, the people of this State, in regard to the subject under consideration.

We add here that the law-making power of the State is to make laws affecting both sexes alike and not in violation of the Constitution, which will accomplish the object desired—to prevent practices hurtful to public morals.

The Constitution was not framed with a disregard of important considerations urged upon us in this regard. It directs that a law which is framed to accomplish its object by affecting or operating upon lawful callings not shall affect both sexes alike. We are not at liberty to say that such important matters were overlooked in framing the organic law.

If the ordinance and law both being unconstitutional, there can be no valid conviction and sentence and no jurisdiction for any purpose. (*Ex parte* opinion filed May 27, 1880; *Ex parte Siebold*, 100 Cal. 375-6-7, opinion of the Court by Brallev, dissenting opinion in *Ex parte Clarke*, 1d. 402, 405-7, dissenting opinion in *Ex parte Siebold*, per Field, J.; *In re Wong*, 4 Pac. L. J., 564; *In re Parrott*, 5 Id., just precedes.)

Therefore foregoing it follows that the section of the Penal Code referred to and the ordinance are both alike in being inconsistent with the Constitution, and are void. They ceased when the Constitution went

into effect (Article XXII, Section 1), if passed before it; the same is true, of course, if enacted since.

The petitioner is entitled to her discharge, and it is ordered.

We concur: Sharpstein, J., McKee, J.

CONCURRING OPINION.

I concur in the judgment. I am not prepared to say, however, that the Supervisors cannot, by proper legislation, prevent females from pursuing avocations which, although permissible to men, involve a propinquity of the sexes and such circumstances as may lead directly to immoral results or to the desecration of the prudent reserve between members of the opposite sexes which it is the province of wise legislation to encourage. It has always been understood that the prevention of such results was a proper exercise of the police power of the State. By such legislation the woman (or the man, as the case may be) is not prohibited from pursuing any lawful business, vocation, or profession "on account of her sex;" she is prohibited because of the immorality or indecency connected with the business. For example, there might be very good reason why women (and not men) should be employed as attendants at a bathing establishment to which their own sex alone have admission; but if a law should be enacted prohibiting the employment of females as attendants at public baths frequented by men only, would it be adjudged that the law was unconstitutional because persons would thereby be prohibited from pursuing a vocation "on account of sex"? The Constitution provides that no persons shall be prohibited from pursuing any lawful business merely because of his or her sex; but it does not prohibit the Legislature from declaring certain conduct unlawful, even though it may constitute a "business." The Constitution does not, in my view, deny the power to enact such legislation as may prevent the intrusion of men into the conjoint pursuit with women of occupations which considerations of decency and morality require should be carried on by the latter separately, and *vice versa*. It is possible that the Legislature is not permitted to indulge in an over-refined sense of propriety, amounting to mere sentimentalism, and thus exclude females from taking part in honest occupations simply because they have, in the past, ordinarily been carried on solely by men, and may therefore seem, in the prejudiced eyes of a more fortunate portion of the community, to detract from the modest reserve and retirement

k. But when competent legislative authority has declared that the pursuit of certain occupations by females upon public decency, or in its consequences may be a violation of public morality, I think the Courts should declare the law unconstitutional only when it clearly appears that indecency and immorality are not connected with or a consequence of, the prosecution of such occupations by females.

While I am not prepared to agree that Section 18 of Article XX of the Constitution prohibits any law or ordinance which would prevent the presence of women, as at saloons or otherwise, at liquor "saloons, bar-rooms," etc., I think that petitioner should be discharged, because I am of the opinion that the ordinance under which petitioner has been prosecuted is void, in that it is unreasonable, of ambiguous import, and not of uniform operation. The practice in effect is declared to be deleterious to the public health, and is the presence of females as waiters or attendants at the guests at any place where malt, vinous, or spirituous liquors "are used or sold," and the presence of females at such places during certain hours of the night. The very presence of females at such places in the night being prohibited, their presence in the capacity of waiters is prohibited, yet the ordinance contains the exception that where a woman or daughter "may happen to be in attendance," she may pursue without punishment the avocation from which waiters are debarred. The ordinance further prohibits the presence of women at public balls where liquors are served, provided the ball "is not given for the purpose of violating the provisions of the ordinance." This last clause seems to prohibit the presence of women at public balls where the dancing is a pretext, and the real purpose is to have the presence of women where liquor was sold. If this is its meaning the ordinance again fails of uniformity, since the presence of women, or even their service as attendants, is not prohibited in places which are not established with an intent to secure profit from them as hotels or restaurants or grocery stores," but which take advantage of the outward pretense of such—the object being simply the sale of intoxicating agents.

It occurs in the judgment: McKinsty, J.

DISSENTING OPINIONS.

I dissent. If the petitioner had been charged with being present in a hotel, restaurant or grocery store, I could find no reason for concurring in the conclusion reached

by Mr. Justice McKinstry, because the charge would have been of an act not made criminal if done by the wife or daughter of the proprietor. It does not appear, however, that the act with which the petitioner was charged is within the exception named in the ordinance: Myrick, J.

I cannot concur in the views of Mr. Justice Thornton, and therefore dissent: Morrison, C. J.

DEPARTMENT No. 1.

[Filed April 15, 1881.]

No. 6708.

GATELY, RESPONDENT, vs. BATEMAN, APPELLANT.

STREET ASSESSMENT—DESCRIPTION—SEPARATE ASSESSMENTS—SIDEWALKS—OLD AND NEW—APPEAL TO BOARD OF SUPERVISORS. The Board of Supervisors declared their intention that sidewalks on a street be reconstructed; one lot with a frontage of eighty-six feet nine and one quarter inches was charged in the assessment for new sidewalks with only thirty-nine feet—there being nothing in the assessment or program indicating which particular thirty-nine feet was subject to assessment, and nothing indicating that said thirty-nine feet was separately assessed: *Held*, an insufficient description of the work contracted and performed. The Superintendent of Streets has no power to charge each separate lot with the work done in front of it. If sidewalks on a street between certain termini are ordered reconstructed, all the fronting on the street are to be treated as benefited in the proportion that each bears to the whole frontage. The Superintendent of Streets has no power to make separate assessments on lots for old and new sidewalks; but the assessment must be to each lot for a share of the whole expense of reconstruction in the proportion its frontage bears to the whole. A property-owner is not bound to appeal to the Board of Supervisors to have a void assessment annulled. In this case the assessment for "planking and curbs" was regular.

Appeal from the Fourth District Court of the City and County of San Francisco.

M. Reiley, for appellant.

J. C. Bates, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

This is a suit to foreclose street assessment in San Francisco.

The Board of Supervisors declared their intention, and ordered that the sidewalks on Leavenworth Street, from Pacific to Jackson Streets, be "reconstructed."

Lot eight—on which it is sought to enforce the assessments—is represented on the diagram accompanying the

with a frontage of eighty-six feet nine and one-eighths inches. It is charged in the assessment for "new sidewalk" with thirty-nine feet, but there is nothing in the map or diagram to indicate which thirty-nine feet of the eighty-six feet nine and one-quarter inches is made subject to the assessment, and nothing on the diagram indicating that the thirty-nine feet of the frontage is separately assessed for the sidewalk. The statute requires that the diagram shall show the number of front feet assessed "for work contracted for and performed"—shall show each lot assessed. (Laws 1871-2, § 10.) It has been repeatedly held by this Court that each lot assessed must be distinctly described upon the diagram. See *People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421. In the proceedings of the Superintendent, at least one lot is charged with the sidewalk, based on his attempt to charge each lot with the work done in front of it. It may be doubted whether a law which should provide such a distribution of the burthen would be constitutional. See *People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421. (*People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421; *People vs. Board of Supervisors*, 10 Cal. 421.) But, whether the Legislature has the power to provide, it has not thus provided by the law which the attempt is made to justify these assess-

ments. We have seen, the Board of Supervisors ordered that the sidewalks between certain *termini* should be "reconstructed." The evident purpose of the statute is to treat the reconstruction as of benefit to all the lots of land upon the street—in proportion to the whole frontage of each lot. (Act of April 1, 1872, *passim*, Stats. 71-2, § 10.) The mere fact that more expense or labor is required in making good the sidewalk opposite a particular lot does not constitute a sufficient reason why the law should require that lot to pay more than its ratable proportion of the cost of reconstructing the whole sidewalk. It is enough, however, that the law does not authorize any such discrimination, or any departure from the mode it prescribes. The Superintendent distributed the expense of reconstructing the sidewalks into two assessments; one for "new sidewalks" and one for "old sidewalks"—charging some of the lots for "new sidewalks" and some for "old sidewalks," not for new; others, again, in part for new and in part for old sidewalks. By "old sidewalks" we understand to have been intended the portions of sidewalks repaired, as distinguished from the portions newly built, and of new material. An examination of the map clearly shows the only method contemplated by its provisions of assessing, for the reconstruction of sidewalks, the assessment of all the lots along the reconstructed

line, each lot being assessed for a share of the whole expense in the proportion its frontage bears to the whole frontage.

For "new" sidewalks lot one is assessed twelve and one-half feet, while it is represented with a frontage of forty feet. Lot two, shown by the diagram to front twenty feet on the reconstructed work, is not assessed at all for "new" sidewalks. Even if the Superintendent had power to make two assessments for work done in reconstructing the sidewalks, each must pervade the whole assessment district—must extend to and include, and impose its ratable tax upon every lot benefited. But part of the lands within the assessment district (and declared by the legislative act to be benefited by the reconstruction of the sidewalks) was not assessed by the Superintendent for "new" sidewalks; part of the lands within the district was not assessed for "old" sidewalks. It follows that the assessments for the old and new sidewalks are invalid. (*People vs. Lynch*, 51 Cal. 15.)

The case is not one of a miscalculation on the part of the Superintendent, or of an overcharge upon the particular lots of land. It involves a question of power. So far as the assessments for reconstructing the sidewalks are concerned, the Superintendent disregarded the whole scheme of the statute.

The pretended assessments for old and new sidewalks, are not assessments. They cannot be corrected, altered or modified (Stats. 1871-2, p. 815), and the property-owner was not bound to appeal to the Supervisors to have "annulled" that which was already void.

The assessment for "planking and curbs" seems to be regular, and to have been accompanied by a proper diagram.

The order denying defendant's motion for a new trial is reversed, and the Court below directed to grant such motion unless the plaintiff shall consent to modify the judgment in accordance with the views expressed in the foregoing opinion.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed April 2, 1881.]

No. 6545.

PACKARD vs. MOSS.

By the COURT:

The case is like *Packard vs. Johnson*, No. 6544.

Judgment and order reversed, and cause remanded for new trial.

IN BANK.

[Filed April 15, 1881.]

No. 5964.

HEN, RESPONDENT, vs. JORDAN, APPELLANT.

TS—DECREE. Action for me-ne profits: *Held*, that such portion of profits as accrued prior to the entry of a decree in equity in the parties concerning the premises out of which the profits would not be recovered, as the said decree should, in that action, vested the rights of the parties as to such profits. A person going into possession of land with knowledge of the rights of the parties is responsible for me-ne profits.

from Seventh District Court, Solano County.

Heaton, for respondent.

Coghlan, for appellant.

delivered the opinion of the Court:

protracted litigation between the plaintiff Hidden and defendant Jordan, in which the former sought to set aside the latter with a trust in respect to certain real estate, a decree was entered on the fourth of June, 1870, in the Seventh Judicial District Court, whereby it was decreed that Hidden pay to the clerk of the Court for the use of Jordan, within sixty days from the date of the decree, the sum of \$15,458.04, with interest thereon at the rate of seven per cent. per annum from the date of the decree, and that thereupon the defendant Jordan execute a deed of good and sufficient deed of conveyance to the plaintiff, and that "upon the payment of the money afore-mentioned by the plaintiff, for the use of the defendant Jordan, the possession of said premises, with the tenements and appurtenances, shall be forthwith delivered up to said plaintiff" (Hidden),

* "and in default of such payment being made by the plaintiff as hereinbefore decreed by him to be paid, the trust herein shall be deemed closed, and the complaint herein shall stand dismissed out of this Court."

On the second of August, 1870, Hidden paid into Court the full amount mentioned in the decree, with interest, the payment being made in currency. Thereafter the Court commanded of Jordan possession of the property, which he refused. The defendant Staples was agent of Jordan, and as such had charge of the property. He also refused to permit Hidden to take pos-

session, but, on the contrary, leased the premises cropping season commencing in the fall of 1870 and ing to the fall of 1871, to the defendant Pierce and Cannon, who, together with Staples, kept Hidden in possession during the term of the lease. Both Staples and Pierce had notice of the litigation and decree.

In January, 1871, Hidden applied to the District Court on affidavits, for a writ of assistance to place him in possession of the property, which application the Court granted, and in the same month held that the payment made by Hidden was insufficient, and thereupon made an order "declaring the trust hereinbefore determined by the Court, and every right of action on the part of plaintiff, to be forever discharged therefrom and no longer an action thereto."

March 15, 1871, Hidden appealed to the Supreme Court from each of these orders, which appeals resulted in the reversal of both orders, the remittitur from the Supreme Court being issued January 27, 1872.

September 13, 1873, the present action was instituted by Hidden against Jordan, Pierce and Staples, to recover the value of the use and occupation of the premises from the fall of 1870 to the fall of 1871, which the Court below found to be \$1,764, and for which it gave the plaintiff judgment.

We think the judgment right. The mesne profits due to the plaintiff previous to the entry of the decree of 1870, could have been and could only have been recovered by him in the action in which he established the trust. He could not afterwards maintain an action for such profits. (*Heinlen vs. Martin*, 53 Cal. 341.)

But the decree of 1870 finally determined the rights of Hidden and Jordan in relation to the land, and admitted among other things, that upon the payment by Hidden to the clerk of the Court for Jordan of the sum named in the decree, the interest, within the designated time, Hidden should be forthwith entitled to the possession of the property. Hidden made the payment in accordance with the decree, and thereupon became entitled to the possession of the property and to the enjoyment of its use and occupation. All the present defendants knew of these rights on the part of Hidden, and, instead of respecting them, detained the property from him to his damage in the sum found by the Court below. For the damage they thus occasioned plaintiff judgment was given, but just that they should respond, and we know of no law that prevents their being made to do so.

s referred to by counsel for appellants are alto-
ke this.

gment and order are affirmed.

ur: Thornton, J., Morrison, C. J., Myrick, J.

CONCURRING OPINION.

If, on the payment by Hidden of the amount in the decree of the fourth of June, 1870, Jord-
dience to that decree, had conveyed the legal title
, then (even had the decree not contained the
airing the delivery of the possession to Hidden)
ould have been entitled to recover the possession
n of ejectment, together with damages by way of
its from the date of the conveyance to the execu-
judgment in ejectment. Inasmuch as the decree
r the surrender of the possession by Jordan, and
nder in fact took place after the reversal of the
ing a writ of assistance, the plaintiff is entitled
mesne profits for the period during which he was
kept out of possession by Jordan and those
der him after the conveyance to him of the legal
ntiff's right to mesne profits did not depend upon
y of the possession in an action at law, but was
made out, as to trespass for mesne profits after
and the execution of the deed under it, by prov-
stence of the decree, and the proceedings under
aced the legal title in him, and which at the same
ed that he be placed in possession—the last pro-
ring to him all that he could have recovered in

Every reason which would make a recovery in
evidence of his right to a judgment for mesne
a period during which the possession should be
ter such recovery, applies to a decree which pro-
transfer of the legal title to him, and at the same
ls to him the possession.

suggested that the case does not show that the
has as yet been conveyed to Hidden by Jordan,
se is ready. The decree does not in terms provide
payment of the money by Hidden, Jordan shall
execute the deed, the decree itself shall operate as
of the legal title, but I think it may fairly be so con-
he decree requires a deed by Jordan, but neither
possession nor his right of possession is made to
on the execution of the deed. On the contrary,
et Court declared: "Upon the payment of the
resaid into Court by the plaintiff for the use of

defendant as aforesaid, the possession of said property with the tenements, hereditaments and appurtenances be forthwith surrendered and delivered up to said Hidden." Reading the decree as a whole, it is a decree that it was intended that upon the payment of the debt Hidden should become the legal owner.

The decree and the payment under it placed the property in plaintiff, and the Court of equity, instead of turning it over to his action at law to recover the possession, held that he be put in possession. But whether the present be called technically an action of "trespass for damages or profits" or not, it is an action to recover damages for wrongful withholding, after judgment, of the possession of the lands of which plaintiff has been adjudicated the legal and equitable owner, and of which he has been put in possession by a competent Court. I entertain no doubt that plaintiff is entitled to recover as damages the value of the use and occupation for the period between the date of the judgment took effect, by the payment of the sum mentioned, and its complete execution by the delivery of the possession to him: McKinsty, J.

I dissent: McKee, J.

IN BANK.

[Filed April 15, 1881.]

No. 6765.

HERNANDEZ, RESPONDENT,
VS.

HIS CREDITORS, APPELLANTS.

INSOLVENCY—AFFIDAVIT OF PUBLICATION—JURISDICTION. In insolvent proceedings the affidavit of publication of notice was as follows: "The attached notice to creditors was published in said newspaper four consecutive weeks, beginning on the 31st of October, ending on the 5th of December, 1878, both days inclusive, in accordance with the statute requiring that such notice shall be published at least one week for four successive weeks; Held, that an interval of one week must elapse between each publication, in order to give the Court jurisdiction, and the affidavit did not disclose such fact."

Appeal from County Court, San Benito county.

Rosenbaum & Sheeline, for respondent.

Wm. Matthews, for appellants.

McKINSTY, J., delivered the opinion of the Court. The affidavit of the printer is: "The attached 'Creditors' was published in said newspaper at least

secutive weeks, beginning on the 31st of October, 1878, and ending on the 5th of December, 1878, both days inclusive."

The statute provides:

"The Judge granting an order for a meeting of the creditors shall direct the Clerk of the Court to issue a notice calling the creditors of the insolvent to be and appear upon a specified day, not less than thirty nor more than forty days from the first publication of such notice, before said Judge, either in Chambers or in open Court, as said Judge shall order, to show cause why the prayer of the alleged insolvent should not be granted. Said notice shall be published at least once a week, for four successive weeks, in a newspaper printed in the county in which the application is made, if there is one; if there be none so published, then a newspaper published in any county adjoining said county." (Sec. 8 of Act of 1852, as amended April 27, 1863; Hittell's General Laws, p. 554.)

The proceeding is *in invitum*, and as the insolvency Court could acquire jurisdiction only after the notice had been published at least as often as once a week, for four successive weeks, the record should show a compliance with this material requirement by testimony which is unambiguous. The Court should have required proof that the exact publication had been made which the statute required. The words "at least" relate as well to the frequency of the publication as to the period during which it is to continue.

The statute evidently contemplates that each of the three last publications (of the four) shall occur with an interval of not more than one week between it and that which immediately precedes it. It does not provide that the publication shall be made at least once in four successive weeks, but—in effect—that there shall be four publications not more than seven days apart. If, therefore, the affidavit can be construed as stating that there was one publication during each of four successive weeks, it does not prove that the publication was such as is required by the statute. There may have been twelve or thirteen days between two of the publications, and, if so, the direction of the statute that the publication must be "at least once a week," has not been obeyed. The words "at least" were not employed in the Act of Congress construed in *Rinkendorff vs. Taylor*, 4 Peters, 349, and even if we were inclined to follow the views there expressed by Mr. Justice McLean, a distinction may be drawn between the language of the Act of Congress considered in that case and the language of the Legislature which we are called on to construe in the present.

Judgment reversed and cause remanded for further proceedings.

We concur: Sharpstein, J., McKee, J., Myrick, J.

I dissent: Thornton, J.

In the United States Circuit Court.

DISTRICT OF OREGON.

[Filed March 18, 1881.]

SURETIES IN AN UNDERTAKING FOR AN ATTACHMENT—LIABILITY
 sureties in an undertaking for an attachment under the Or.
 Section 144, in case the plaintiff fails to obtain judgment in
 are liable to the defendant for all the costs and disbursements
 may be adjudged to him, whether the latter are made in the
 upon the attachment.

John M. Gearin and Byron C. Bellinger, for plaintiffs.
John H. Woodward and Charles H. Woodward, for defendants.

DEADY, J.:

This action was commenced in the Circuit Court of the county of Multnomah. The defendants appeared and asked that it be removed to this Court. It is brought upon an undertaking of the defendants for an attachment given in an action of *Ah Jim* vs. *Ah Kow*, then pending in the Circuit Court for the county of Clatsop, in November, 1879.

The complaint alleges that, in pursuance of said undertaking, and the affidavit of *Ah Jim*, a writ of attachment was issued in said action, upon which the property of *Ah Jim* was attached, at Astoria, consisting of five houses and land in which he was then engaged in business as a Chinese merchant, whereby he was put to great expense and trouble in his credit as a merchant injured, to his damage \$214. On January 7, 1880, *Ah Kow* died, and the plaintiff, being the executor of his last will, was made defendant in the action, in which, on February 3, 1880, the defendant obtained a judgment against *Ah Jim* for the sum of \$100, with costs and disbursements therein, and that execution against the property of *Ah Jim* has been returned unsatisfied; that in the defense of said action the defendant herein was put to expense, in the employment of attorneys and attorneys, to his damage \$375; and that said action was malicious, and without probable cause.

tations concerning the injury to the credit of the testator, and the expense incurred in the employment of attorneys, were, on motion of the defendants, stricken from the complaint as immaterial.

Defendants then pleaded in abatement of the action, that appeal had been taken from the judgment of the County Court against Ah Jim, for costs and disbursements, to the Supreme Court, which was still pending; and that, on the motion of the plaintiff, was stricken out of the record, it not appearing therefrom that any underwriting had been given on such appeal to stay the proceedings on the judgment.

Defendants then answered, denying the allegations of the plaintiff, except as to the judgment for costs; and as to that it was for not more than \$109.25, and the right of the plaintiff to sue as executor.

The case was submitted to the Court for trial without the aid of a jury, and it found that the attachment was wrongful and levied as alleged, and that it was wrongful; that the plaintiff's testator was injured thereby in the sum of \$144.25, so that the plaintiff herein obtained judgment in favor of the plaintiff against the defendant herein, Ah Jim, for his disbursements, taxed at \$144.25, and \$2.45 accrued on the execution.

Defendants contend that, as the attachment was only incidental to the action, they are not liable at all for costs, or for such expenses as were incurred on account of the attachment. On the contrary, the plaintiff insists that under the statute he is entitled to recover the costs and disbursements adjudged to him in the former action, whether of the action itself or the attachment therein. In support of his position, counsel for defendant cites *Norton v. Norton*, 10 An. La. 10, in which it was held that a sequestration bond is only liable for such expenses as are incident to the sequestration and release; and *Wiley*, 17 Ala. 167, cited in *Drake on Attachment*, § 6, is to the same effect.

The statutes under which these rulings were made are similar to those in many of the States in which the liability of the obligors in a bond or attachment for an attachment for both costs and damages is based upon the fact that they are the result of the attachment; and where that is merely ancillary, of course it includes such as are simply the result of the action. This is not the language of the statute of this State. Section 4 of the Oregon Civil Code provides that the

plaintiff in an action, before procuring a writ of attachment to issue, shall give an undertaking, with one or more sureties, "to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful and without sufficient cause, not exceeding the amount specified in the undertaking."

"Costs," as used in this section, only includes an allowance for attorney fees; but a party entitled to "costs" is also entitled to disbursements. (Or. Civ. Code, Sec. 538-43.)

No provision is made in the Code for an allowance of costs upon an attachment as distinguished from the action in which the writ issues, nor can any disbursements be allowed or recovered except by a party entitled to them; neither is there any provision authorizing the taxation of the recovery of disbursements upon an attachment before judgment, otherwise than upon the final judgment in the action. Therefore if the attachment should be discharged, upon the application of the defendant, as being wrongful, as provided in Section 159, and the plaintiff should also obtain judgment in the action, the defendant could not recover the expenses incurred on the attachment otherwise than by an action upon the undertaking as a part of the damages sustained by reason of the attachment. But when, as in this case, the plaintiff in the action fails to obtain judgment, and the attachment also fails, and is *prima facie* wrongful, the defendant, being entitled to judgment for costs and disbursements in the action, may include therein the disbursements made on account of the attachment, unless objection is made to the taxation, when the wrongfulness of the attachment is not controverted by the plaintiff by showing that, notwithstanding the failure to obtain judgment, there was good ground for issuing the attachment, and the Court will pass upon the question, and allow or disallow the taxation of the disbursements accordingly. (Drake on Attachment, Sec. 170.)

With this brief reference to the provisions of the Code bearing on the subject, and their operation, we will consider the effect of Section 144, *supra*, as applied to this case. The Supreme Court of the State has not passed upon the question, and this Court, for the present, must decide for itself.

Counsel for the defendants contend that the parties giving the undertaking are not bound to pay "all costs that may be adjudged to the defendant" in the action generally, but

re so adjudged by reason of the attachment; while judgment of the plaintiff is that the statute expressly gives him a right to recover all costs adjudged, when the plaintiff fails in the action, thereby making the undertaking a security for costs.

At judgment the parties to the undertaking incur two obligations: (1) To pay all costs and disbursements which may be adjudged to the defendant, not including all damages which he may incur by reason of the attachment, but only such as the Court in which the action is tried shall determine he is entitled to; and (2) to pay all damages that the defendant may sustain by reason of the attachment, if the same be wrongful, and this includes damages incurred by reason of a wrongful attachment, even if the plaintiff prevails in the action. Of course this undertaking makes the undertaking for an attachment a security for costs in the action where the plaintiff fails to obtain judgment therein, but it is not apparent why this should be the right to prevent the Court from giving the statute its full force according to its language and probable purpose. This provision may be considered as a wholesome security upon the proceeding by attachment in aid of a claim.

The New York Code, Section 230, provides that the undertaking for an attachment should be to the effect "that if the plaintiff fails to recover judgment, or the attachment be set aside by order of the Court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment." In other words, if the plaintiff fails in his action, the parties to the undertaking are to pay the costs thereof.

The statute of Tennessee is also similar in this particular to that of Oregon, but I have not found any decision under either the New York one on this question. It provides that the sureties shall satisfy "all costs which shall be awarded to the defendant in case the plaintiff shall be cast out of the suit, and also all damages which shall be recovered by the plaintiff * * * for wrongfully suing out the attachment." (Drake on Attachment, Section 170.)

The plaintiff in this action is entitled to recover the sum of \$100, the costs and disbursements adjudged to him in the former action, and also the sum of \$75, the damages awarded by his testator by reason of the attachment in said action, all \$221.70, and there will be findings accord-

U. S. CIRCUIT COURT, DISTRICT OF OREGON.

[Filed March 22, 1881.]

No. 714.

THE CITY OF PORTLAND,

VS.

THE OREGONIAN RAILWAY CO., LIMITED.

CAUSE REMOVED - INJUNCTION. Upon the removal of a cause to a Court, the former has power before the first day of its next term to allow or modify its injunction.

INJUNCTION. Where a suit for injunction turns wholly upon the validity of an Act of the Legislature granting the defendant the exclusive use of certain property to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or wharf, and the use of such property in a way not materially inconsistent with any use to which it is being put is of great advantage to the defendant, an injunction restraining it from such use will be made accordingly; and in the consideration of the matter, weight will be given to the presumption that an Act of the Legislature is valid, and that the defendant is engaged in a public enterprise in which the public is interested.

BOND. Upon the modification of an injunction the Court may require as a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same.

In equity. Suit for injunction.

Julius C. Moreland, for plaintiff.

Ellis C. Hughes, for defendant.

DEADY, J.:

At the last session (1880) of the Legislative Assembly an Act was passed granting the defendant, the Oregonian Railway Company, limited, among other things, the use of a triangular-shaped piece of ground lying between the east and west sides of blocks 112 and 113 of the City of Portland, and the bank of the Wallamet River, the same being, as appears from the map, about 520 feet long and 50 feet wide at the south end, and 300 feet at the north end, and known as the "Public Levee," and dedicated to public use as a levee by a map and ordinance of the plaintiff, the City of Portland, recorded March 6, 1869, "to be held, used and enjoyed by the plaintiff, for the purpose of storing, depositing, receiving, occupying by track, side-track, water stations, depot, wharves, wharves and warehouses," and such other "erections, buildings, wharves and warehouses," and such other "erections, buildings, wharves and warehouses," as may be found necessary or convenient in the shipping and storing of freight under the exclusive control of the City of Portland of the railway then being constructed by the defendant, the Oregonian Railway Company, limited, from the City of Portland to the head of the Wallamet Valley, with a power that the defendant should not sell or assign the premises otherwise than as an appurtenance to said railway; and

shall be forfeited if said railway is not commenced on the said premises before January 1, 1882; saving to the plaintiff "any pecuniary or property rights" which it has in the said premises "as a municipal corporation, and the State may not lawfully appropriate in this Act." In compliance of this Act the plaintiff entered upon the premises and commenced to prepare the ground for the uses authorized in the Act.

The plaintiff, claiming the Act of the Legislature to be in violation of its power, and therefore void, on January 31, 1881, filed a suit in the State Circuit Court for this county, praying to enjoin the defendant from occupying or using the premises thereunder, and on the same day obtained an order for a temporary injunction, restraining the defendant from doing as prayed for in the bill, which was served on the defendant thereafter.

On February 17th, the suit, on the petition of the plaintiff, was removed to this Court, and the transcript was filed on February 25th.

On March 17th the plaintiff filed a petition asking that the injunction heretofore granted be modified so as to allow it to be used for the premises for a track and side tracks to facilitate the junction of its road from Portland to the point where it meets with the junction of the sections thereof constructed between a point in Marion County and a point in Linn County, on the east side of the Wallamet River, between Dayton and Sheridan and Dallas on the west side, and that it is the owner of the east part of block 71, lying wholly north of said levee, and has a wharf thereon for the loading and unloading of sea-going vessels; that the iron for constructing said railway must be imported in such vessels, and that it allowed the use of the levee as aforesaid in connection with said block 71 and wharf thereon, it can receive and store said iron at a great saving of time and expense; that it is now being made of said levee, and that a track can be laid across it without interfering with the use of it as a levee, and without materially affecting the surface of the

On March 21st the plaintiff showed cause against the application by the affidavit of its clerk, and the matter was referred to the counsel.

There is no doubt of the power of the Court to grant this injunction at this stage of the proceedings. For, although the case is not for trial or hearing in this Court until the first of the next term (the second Monday in April), yet it is not far from the date of the removal, and such con-

servatory acts as the allowance or modification of an action may be had therein at any time thereafter. *Mining Co. vs. Bennett*, 4 Saw. 289; *New Orleans City & Crescent City R. Co.*, 5 Fred. Rep. 100.) The final determination of this case will turn upon the validity of the Act granting the use of the premises to the defendant.

The presumption is in favor of the validity of the act at this stage of the litigation this presumption ought to have weight. At least it will not do to assume that the Act is valid, but only that it may be so. There are no public equities in the bill which the defendant must answer. If it is entitled to a modification of this injunction, it is only a suit to try the title of the defendant to the property which is claimed to be subject to a public easement. A preliminary injunction is only allowed to preserve the property for such use in case it is determined that the defendant has no title thereto. Therefore the defendant ought to be any further restrained, until the invalidity of its title is determined, than is necessary to preserve the property for the purpose to which the plaintiff claims it is devoted. The property is an unimproved piece of ground, of which no practical use has ever been made as a public levee or landing, and probably never will be until it is improved by the erection of wharves and warehouses thereon. The business of loading and unloading vessels is not done in this country upon quays or mud banks. The use of the property for the purpose of operating a track and side track thereon during the pendency of this suit, so as to enable the defendant to connect the construction of its road by rail with its existing road at block 71 aforesaid, and complete it in time to prevent the forfeiture of the grant, will work no possible harm to the plaintiff or public, and may be of much benefit to the defendant. For it seems that by the Act the defendant is required to complete its road "to the said premises," or place "erections" thereon of the value of \$10,000, before January 1, 1900, or the grant is forfeited. On account of this injunction the defendant cannot place the "erections" on the property, and if the injunction is modified as suggested, it may not be able to complete the road under the other condition.

Indeed, there is but little reason for a preliminary injunction in this case at all. As has been said, the defendant is making no use of the property as a levee or other public use, and cannot until it is improved. And if the defendant is permitted to go on and build a depot thereon, as well as a track and side tracks, what harm would result to the plaintiff from it? If the final determination is against the defendant,

be compelled to remove them (*C. S. U. Co. vs. V. W. Co.*, 1 Saw. 482), or, what is more likely, the plaintiff may keep the improvements as a part of its property and thereby gain what the other loses. Nor is there any question that the defendant is insolvent and unable to pay in damages for any injury it may cause to the plaintiff. If this were a public levee or land-claim as well as name, and the defendant was materially interfering with the public use of the premises by its "pre-errections" and "constructions," there would be no reason for restraining it until its right to do so was finally decided. But as it is, there is no public use to be disturbed and the actual controversy is confined to the right of the defendant to the exclusive use of the premises; and their conduct in the meantime in such a way as to cause no injury to the plaintiff, and at least not to materially interfere with the plaintiff's use, if any, ought not to be restrained.

In the consideration of this question, it ought not to be forgotten that the speedy construction of the defendant's wharfe-way to a deep water landing in this city is a public use in which the public is interested. As such, the plaintiff has undertaken to encourage and promote its construction at an early day. On this consideration, alone, a court should be careful in the exercise of the power of injunction to issue a final decree, not needlessly or lightly to interfere with the progress of such an enterprise, or by delaying or postponing its construction for a season deprive the community of the benefits that may be derived from it.

Therefore, the Court has authority, in the exercise of this power, to take security against any injury which the plaintiff may sustain by reason of the acts permitted to the defendant. (*U. S. Co. vs. St. P., M. & M. Ry. Co.*, 4 Fed. Rep. 692.) The injunction be modified so as to permit the defendant to construct and operate a track and side tracks over and under the premises during the pendency of this suit; it first to post and in the penal sum of \$5,000 with one or more bonds to be taken and approved by the master of this Court conditioned that it will upon the order of this Court to vacate the entry of a final decree in this suit against the plaintiff's claim of the defendant to the use of said premises and by virtue of said legislative Act, remove said side tracks from said premises and leave the same open and available for use as a public levee as they now are. And the defendant may deposit in the registry of this Court United States bonds of the par value of \$5,000 as a security for the performance of said acts.

FACETIÆ.

AFTER a jury had been deliberating several hours the foreman, whose name was Sweet, sent the following note to the judge, whose name was Devine:

Dear Judge Devine,
Please send some wine
And something good to eat.
It is plain to see
We can't agree.
Your obedient servant—SWEET.

"THAT prisoner has a very smooth countenance," said the Judge to the Sheriff. "Yes," said the Sheriff, "he was just before he was brought in."

THE Galveston lawyers have got a good laugh on a lawyer who was defending a colored kleptomaniac on a charge of insanity. The attorney for the defendant made an elaborate speech, on the irresponsible condition of his client's mind, to the jury, and took his seat. His idiot client reached over and touched his advocate's arm, and said emphatically, "You are the biggest fool on Governor's Island." The opposing attorney remarked, "There, I told you he had lucid intervals!"

A JURYMAN, on seeing one of the lawyers in the case bring a champagne basket filled with law books into Court, remarked as follows:

O cease your talk; your suit is vain;
Our verdict, do not ask it;
We might do something for champagne—
But do not bring your books and basket.

PRIOR to the war, two lottery dealers, who hailed from Augusta, Ga., were tried for a violation of the Penal Code, and acquitted. The Prosecuting Attorney, who was sufficiently intoxicated to be indifferent to consequences, asked the Court to bind over the two prisoners for keeping a gaming-table. This motion was denied. The Prosecuting Attorney then asked that they be committed to jail as vagrants. This was also refused. This motion was followed by one asking that the accused be held to answer the charge of being a nuisance, which shared the fate of its predecessors. The fun-loving Judge, who was a Georgian, perceiving the course of the State's attorney, asked if he did not wish the defendants to be sent to jail for being Georgians. As quick as lightning the attorney was on his feet, and remarked: "That is altogether unnecessary, may it please the Court, for they are included in the motion I last made." The Court-room was convulsed with laughter; but Judge D., although he loved a joke at any expense, failed to see the point.

Pacific Coast Law Journal.

L. APRIL 30, 1881.

No. 10.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed April 14, 1881.]

No. 6635.

ESTATE OF HINCKLEY.

CHARITABLE USES—WILL—PERPETUITIES—ESTATE—DISTRIBUTION. A will providing for the establishment of a perpetual trust, the income of which is to be devoted perpetually to "human beneficence and charity," is a valid creation of a trust for charitable uses. A trust for such purposes must be perpetual, and the objects and beneficiaries of the trust must not be definitely indicated. Laws relating to perpetuities, relating to the objects and beneficiaries of voluntary trusts to be specifically designated, do not apply to trusts for charitable uses. Property may be devised or bequeathed in trust for such uses, where the testator leaves property to his heirs, only to the extent of one-third of his estate—the word "estate" meaning the gross estate of the testator. A residuary legatee cannot object to a mode of distribution which in no way prejudicially affects her.

Filed from the Probate Court of the City and County of San Francisco.

Barbour & Scripture, for appellant.

Phillips, for respondent.

STEIN, J., delivered the opinion of the Court:

The will provides for the establishment of a perpetual trust, the income of which is to be devoted perpetually to human beneficence and charity, which, as we construe it, is for charitable uses. The will, if valid, creates a perpetual trust. The objects and beneficiaries of the trust are not definitely indicated. If perpetuities for charitable uses are prohibited by the law of this State; or, if it be essential to the validity of trusts of this character that the objects and beneficiaries of them be specified, it must be conceded, we must hold that the attempt in this case to create a trust for charitable uses has failed. Property may be devised or bequeathed in trust for charitable uses to the extent of one-

third of the estate of a testator, if made thirty days prior to his death. (C. C., Sec. 1313.) No attempt is made in the Code to define the meaning of the phrase "charitable use," and if it had a well-defined meaning in law when the Code was enacted, that meaning must be given to it. The Legislature must be presumed to have used the phrase in its ordinary sense. At the time of the enactment of the Code it was well settled that trusts for charitable uses should be perpetual, and that they should be indefinite as to their objects and beneficiaries. "There was never any objection to the creation of perpetuities in regard to charitable trusts, it being the essence of charity to make it perpetual." (2 Redfield's Wills, 821.)

"To limit charitable trusts which in their very nature involve the idea of indefinite continuity, by two lives in the Code is substantially to abrogate them; and this, I am sure, would not have been done by express and unequivocal language had it not been intended to do it at all." (Per Denio, J., in *Williams v. Trustees of the Society for the Relief of the Poor*, 8 N. Y. 557.)

"No perpetuities shall be allowed except for eleemosynary purposes." (Const., Sec. 9, Art. XX.) Here is a clear recognition of the propriety, if not of the necessity, of allowing them for such purposes. This constitutional provision and the provision of the Code which authorizes the creation of trusts for charitable uses, indicate that it is not the policy of this State to discourage charity.

And, as before remarked, it is quite as essential to the constitution of a charitable use that it should not specify its object or beneficiaries of it as that it should be perpetual. "There is no need of any particular persons or objects being specified; the generality and the indefiniteness of the objects constituting the charitable character of the donation." (1 *Donations on Charities*, 23.)

"A good charitable use is 'public,' not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit." (*Saltonstall v. Saunders*, 11 Allen, 456.) "It is no charity to give to a friend. In the books it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which requires the sheaf to be left in the field for the needy and the stranger." (*Fountain vs. Ravenal*, 17 How. 384.)

Assuming that the perpetuity and indefiniteness of a trust are essential to constitute it one for charitable uses, it would seem to follow that the Legislature, when authorizing

charitable uses, had in view just such trusts as this. The provisions of the Code which relate to the certainty of the subject, purpose and beneficiary of the trust must be indicated, do not require anything beyond reasonable certainty." (C. C., Sec. 2221.) And what is the certainty must depend on the nature of the trust. For charitable purposes, as we have seen, does not require any greater certainty as to the objects and beneficiaries than is indicated in this trust. Therefore it would be reasonable to require any greater. In ordinary trusts the requirements are different. They do admit of so much certainty as to the objects and beneficiaries as to render their identification possible.

The section which provides in what manner property may be given or bequeathed for charitable uses was added to the Code more than a year after the sections relating to perpetuities and the creation of trusts generally went into effect. There is no inconsistency between the earlier and the later provisions, the former must yield. But there is nothing in the Code to indicate an intention to change the general law which existed at the time of the enactment of the Code on this subject. And it was well settled at that time that the laws against the creation of perpetuities, and the requirement that the objects and beneficiaries of voluntary trusts be specified, did not apply to trusts for charitable purposes. If the Legislature had intended to change the law in that respect, it must be presumed that such intention had been clearly expressed. (C. C., Sec. 4.)

The donor states that he desires to foster religion, learning, and invites the attention of the trustees of the fund to the trials and afflictions of the industrious, the unfortunate poor, and especially to the aged, the infirm and the lonely. The sum which he desires to have applied to learning and the manner of applying it to that end is specified, but nothing is said as to the amount he wishes to have devoted to religion, or in what manner shall be expended in that direction. He probably intended to foster religion by his example—by the exhibition of the virtues common to all religions. He fostered charity by his example, religion by doing an act which is regarded as wherever religion exists. But the gift is to the poor, the infirm and charity; and the poor, the aged, the infirm and the lonely were uppermost in his thoughts. He thought that by providing for them he would foster religion. In the broadest sense of the term his idea was to foster religion. That he desired to have any portion of the chari-

table fund devoted to churches or religious societies can be inferred from the language of the will. There is no indication to indicate an intention to foster religion in that way.

The testator left heirs, and, therefore, could not devise bequeath more than one-third of his estate to trustees for charitable uses. (C. C., 1313.) The devise is of "California Theatre" property, out of which certain specific legacies are to be paid, and the residuum devoted to charities. The residuum exceeds one-third of the entire estate, and the law requires that the excess be eliminated from the devise. The Court below held that the devise was good to the extent of one-third of the entire estate, and computed the residuum upon that basis. The question whether the devise must be limited to one-third of what remains of the estate after payment of debts and expenses of administration, or to one-third of the entire estate, depends for its solution upon the language of the statute. There is nothing in the will which indicates that the testator considered what proportion of the estate he was devising to charitable uses. The proportion which he desired to have devoted to such purposes was not defined and specified, without any apparent reference to proportion or value. He had in view a specific piece of property. It turns out that it constitutes more than one-third of his estate. It, therefore, becomes necessary to determine what constituted his estate at the date of his decease. What is meant by the phrase "one-third of the estate of the testator, leaving legal heirs?" Does it mean one-third of what remains of the estate after the payment of the testator's debts? That is denominated "the residue of the estate" (C. C. P., 1665), which implies that the estate originally included what had been deducted for the payment of debts, and that after such deduction it was not the estate but the residue of the estate that remained in the hands of the executors. The entire estate comprises the property of the testator; an inventory and appraisement must be made and returned to the Court. (C. C. P., 1442.) The word "estate" is differently used in the Code relating to wills as the synonym of property. If the language of a statute be plain the Court cannot enlarge or limit it by construction. The word "estate" has a well defined meaning in law. We know of no rule by which we would be warranted in holding that it means part of the estate, or an estate after certain deductions have been made from it. If that was what the Legislature had in view it is much better to wait for another expression of the legislative intention than it is to have the Court infer an intention different than that which is clearly expressed.

distribution of the estate the trustees of the charity upon which there existed a mortgage. The as- the mortgage and the trustees consented to that dis- and, as it can in no way prejudicially affect the of the residuary legatee, her objection to it cannot red.

ord, as we view it, presents no error for which the and decree of the Court should be disturbed.

at affirmed.

ur: Myrick, J., Morrison, C. J.

: Thornton, J.

DEPARTMENT No. 1.

[Filed April 13, 1881]

No. 6543.

NNAN, RESPONDENT, vs. PATY, APPELLANT.

—PLEADING—PRACTICE—RELIEF IN ACTION TO QUIET TITLE.
pleaded in *defense* of an action does not constitute a counter or entitle the defendant to affirmative relief. An averment in ver will not be held to constitute a counter claim unless it is minated and the appropriate relief prayed. In an action to tle to real property it is improper to order the execution of a the defendant; the appropriate relief is by decree.

from Fourth District Court, San Francisco.

with, for respondent.

Houghton, for appellant.

delivered the opinion of the Court:

o presents an appeal from a judgment dismissing and the determination of the appeal depends on n whether the answer to the amended complaint counter claim. On both sides the pleadings con- of inappropriate matter—matter of evidence and ch is neither of evidence nor of pleading. The use of the action, however, seems to have been to plaintiff's alleged title to certain real property f the averments of the amended complaint were appropriate relief would have been a decree to that ot one to compel the execution of a deed or deeds of the defendants, as the plaintiff's prayer also t be required. The answer consisted of various matters alleged in the complaint, and by way of

"further answering" and "for a further and separate defense," set up matters which, if true, might have defeated plaintiff's action, and which, if properly pleaded, might entitle the defendants to affirmative relief. But all of matters, so far as they had any place in the pleadings appears to have pleaded in defense of the plaintiff's cause of action, and not otherwise. In *Doyle vs. Franklin*, 40 110, the Court said: "Where matters which are proper for defense are pleaded as such, we are clear that they should be regarded only as such, notwithstanding a plea for affirmative relief at the conclusion of the answer. Matters of the cause of complaint must be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action." In the case of the *Equitable Life Assurance Society vs. Cuyler*, 75 N. Y. 514, in which the defendant, after making certain denials, set up in answer, "for a second and further defense," certain matters which it was contended entitled him to affirmative relief, the Court of appeals of New York said: As a distinction exists between a defense and a counter claim, when the defense is intended as a counter claim it should be expressly stated in the answer, so as to advise the opposite party; and in the absence of such an allegation, especially when the plaintiff defines and characterizes his answer as a defense, and it is uncertain whether a counter claim is intended, such party is not in a position to insist that he has actually set up a counter claim, and the answer should be construed and considered as a defense."

It is sometimes a difficult matter to draw the line between the counter claim and the defense, and for that very reason a rule ought to be declared which will, in the future, prevent any conflict in the decisions on that subject, which might otherwise occur. We find such a rule laid down by the Supreme Court of Wisconsin, in the case of *Stowell vs. Egan*, 39 Wis., p. 630, which, with the language in which it is declared, we adopt as our own: "On former occasions this Court has had under consideration answers containing averments of fact so pleaded that it was doubtful whether counter claims were predicated upon them, or whether they were alleged merely as defenses, and by argument and the application of various tests, the Court has determined the character of these pleadings. Should it be asserted that there is inconsistency in those decisions, we are not prepared to dispute the assertion. The rule on this subject should be certain and uniform. In order that it may be so in the future we take this occasion to say that hereafter no averment

be held to constitute a counter claim, unless it is stated and the appropriate relief prayed. Wanting issues, the pleading will be held to be a defense as so easy to commence a counter claim, by denominated a counter claim and to close with a demand for it is not unreasonable, and does no violence to the Code, to require the pleader to do so."

not affirmed.

Cur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed April 19, 1881.]

No. 5883.

PORTER, APPELLANT,

VS.

WOODWARD ET AL., RESPONDENTS.

EVIDENCE—PRACTICE—VAN NESS ORDINANCE. The Judge of the Court is not bound to adopt the findings prepared by either party. He may adopt, modify or reject them, and may himself prepare the findings. A party requiring a finding upon a particular point must state the point without dictating the terms of the finding. A finding in favor of neither the plaintiff nor his, nor any or either of his, predecessors, grantors, or of those under whom he claims, ever were in or in possession of any part of the land described in his complaint, as described in the answers of the defendants against whom the action was tried, or of which said defendants were in possession when the action was commenced" (the action concerning premises covered by the Van Ness Ordinance), is a finding of fact from which the conclusion of law follows that plaintiff never had any title. If plaintiff has no title, it is immaterial whether the facts found show a defense under the Statute of Limitations or not. Evidence being conflicting, the decision of the Court below will not be disturbed. A deed having been found in evidence, held that, as it only embraced land not in controversy, there was no error in excluding it.

from the Nineteenth District Court, San Francisco.

Brooks, for appellant.

Wastick, S. M. Wilson, and Jarboe & Harrison, for respondents.

Mr. Justice, delivered the opinion of the Court:

The action was ejectment, brought to recover a parcel of land within that portion of the City and County of San Francisco affected by the Van Ness Ordinance. Judgment was given for the defendants. The plaintiff moved for a

new trial, which was denied, and he appealed from the above mentioned.

The cause was tried by the Court, who made the following decision by means of findings of fact and conclusions of law:

"1. That neither the plaintiff herein, nor his nor either of his ancestors, predecessors or grantors, or of those under whom he claims, ever were in, or had or were entitled to, the possession of any part of the land described in said complaint, which is described in the answers of the defendants against whom the action was tried, or of which defendants were in possession when the action was commenced.

"2. That neither the plaintiff, nor any or either of his ancestors, predecessors or grantors, or of those under whom he claims, ever had any estate, right, title or interest in any part of the land described in said complaint, described in the separate answers of said defendants, or of which defendants, or either of them, were in possession when the action was commenced.

"3. That at the time this action was commenced the defendants were of right in possession of the parcels of land described in their respective answers; and that said defendants, their ancestors, predecessors and grantors, and those under whom they claimed, had been in the actual, peaceful, open, notorious and uninterrupted possession and occupation of said lands, holding and claiming to hold the same adversely to plaintiff, his ancestors, predecessors and those under whom he claimed, and to all the world, for more than seventeen years next before the commencement of this action, having entered thereon under claim of title exclusive of any other right, founding such claim upon instruments in writing purporting to convey said land, and the title thereto, to them respectively.

"And as to the conclusion of law from the facts found, find that plaintiff should take nothing herein against said defendants, and that said defendants herein are entitled to have and receive of plaintiff their costs therein expended, and order judgment be entered accordingly."

It appears from the bill of exceptions that on the eighth of August, 1874, the Court announced its decision and directed the counsel for both parties to draw findings of fact and conclusions of law, and that "thereupon the plaintiff's counsel prepared findings of fact and conclusions of law, and presented them to the Judge for his signature, and the Judge to sign the same; and the counsel for the defendants also presented findings, and requested the Judge

; and both were submitted to the Judge on the six-
th day of September, 1874, and taken under advisement.
On the eighth day of January, 1875, the Judge
the findings which are on file, and refused to sign the
or any of them, requested by the plaintiff, to which
and refusal to sign the plaintiff, by his counsel, then
excepted."

time that this cause was tried, submitted and de-
the Court below, Section 635 of the Code of Civil
re, as it originally stood in that Code, was in force.
pealed in 1876.) That section was in these words:
time the cause is submitted the Judge may direct
both of the parties to prepare findings of facts,
they have been waived; and when so directed, the
st within two days prepare and serve upon his ad-
and submit to the Judge said findings, and may
two days thereafter briefly suggest in writing to the
by he desires findings upon the points included
ne findings prepared by himself, or why he objects
gs upon the points included within the findings pre-
y his adversary. The Judge may adopt, modify or
e findings so submitted. If, at the time of the sub-
of the cause, the Judge does not direct the prepara-
ndings, or if none are prepared or submitted within
prescribed, or those prepared are rejected, then he
self prepare the findings."

apparent from the section above quoted that the
not obliged to adopt and sign the findings prepared
r party, though he may direct them to be prepared.
y adopt, modify or reject" them, though thus pre-
d submitted. He is thus at liberty to reject all
prepared and submitted under his direction, and
prepare the findings in the cause.

acts at last must be found by the Court. The Court
d with the duty and responsibility of finding them.
vs. *Steen*, 30 Cal. 402, it was held that a party re-
finding upon a particular point should specify the
hout dictating the terms of the finding. This must
asmuch as it is the duty of the Court to find the
ne right of the party does not extend beyond speci-
suggesting the point on which a finding is required.
vs. *Jordan*, 28 Cal. 254-5.) The judgment in *Tewks-*
Magrath, 33 Cal. 248, on this point accords with
s held in *Miller vs. Steen*. Inasmuch as the Court or
d the right to reject the findings prepared and sub-
y counsel, and prepare the findings in the case, the

exception under consideration is not, in our opinion taken.

It will be observed that the exception is to the refusal of the Judge to sign the findings, or any of them, which the plaintiff requested him to sign, and not to any refusal to sign on any matter requested. We do not see how, under the state of things, this could be error, inasmuch as it was the right and duty of the Judge or Court to determine what findings should be.

The Court found as a fact that neither the plaintiff, nor any or either of his predecessors or grantors, or of any under whom he claims, ever were in or had possession of any part of the land described in his complaint, which is described in the answer of the defendants against whom the action was tried, or of which defendants were in possession when the action was commenced.

The land in controversy was in that portion of the City and County of San Francisco affected by the provisions of the Van Ness Ordinance. The title to such land was derived from actual possession during a period of time commencing on or before the first day of January, 1855, and continuing up to the time that the aforesaid was introduced into the Common Council, which was a day not later than the 20th of June, 1855. The Court, as has been above stated, found as a fact that neither the plaintiff nor any person under whom he claims title, ever were in, or had possession of, any of the lands in controversy. This was a finding of a fact, which it followed as a conclusion of law that the plaintiff never had any title. The finding of such fact was sufficient without going more particularly into any of the matters which were claimed to constitute possession. Whether the party was possessed or not has always been regarded as a matter of fact. It was always averred in this way as a fact in the declarations in the common law actions of detinue and trover, as well as in the declaration in the action of ejectment. (See Declaration in Detinue, 2 Chitty's Pl. 59; Trover, *Id.* 825; in Ejectment, *Id.* 879-80.) This is a common and unusual mode of alleging possession with us. We regard such a finding as a finding of fact, and not as a conclusion of law.

It may be that if the plaintiff had requested the Court to find on particular points which were material on the issue of possession or not, and the Court had refused, we might have taken exception to such ruling, have held that it was obligatory on the Court to have found on such points as asked. But no such request was made, and, in the absence of such request,

ment, we must hold that the finding as to possession mode adopted of making it negatived each part tending to show possession, and was as specific required. It came fully within the criterion suggested by plaintiff's counsel as laid down in *Breeze vs. Doyle*, 12—2—that of a special verdict, which we think is a verdict to which to subject such findings. The finding of possession in this case came up to the rule. (See *Hihn* 30 Cal. 286.)

finding in relation to the possession of the plaintiff the conclusion of law that the plaintiff never had possession of the land in controversy, and sustained the judgment rendered in favor of defendants.

We found the facts from which it appeared that plaintiff had any title to the land sued for, it was immaterial the facts found show that a defense was made out by possession under the Statute of Limitations or not. Plaintiff had no title when the action was commenced, and could not recover against the defendants regardless of the length of time they had been in possession. The defense under the Statute of Limitations thus became immaterial, and there was no error even if the Court failed to find all the facts relied on in such defense.

The findings were also assailed on the ground that the evidence was insufficient to sustain them. That the evidence was insufficient on these matters was conflicting on material points asserted on the argument. We found it to be so on the transcript. Such being the case, we cannot reverse the decision of the Court on that ground. This has often been decided, that it is unnecessary to cite any authorities sustaining the rule.

At the trial after the defendants had rested, the plaintiff introduced in rebuttal a deed from Samuel Brannan to Albert Brannan dated July 16, 1853, which embraced the land in controversy. The following then occurred:

Wilson [who was of counsel for defendants]—I object to the introduction of that deed in evidence, as irrele-

Brooks [for plaintiff]—I propose to show that the defendants' occupation there were in privity with us; that the defendants' acts and occupation upon the land in the garden were made by our tenants in common. The Court overruled the objection."

The ruling there was an exception on behalf of plaintiff. The objection was to the deed, and we cannot see that the deed itself was admissible for any purpose. If it was of-

ferred as a part of a chain of title, in connection with the (plaintiff) intended to show that the defendants were tenants in common, then the offer only related to the garden tract, and it does not clearly appear from the transcript that the garden tract was at all in controversy; on the contrary, we understand that it was conceded on the argument that the garden tract was known as and called the garden tract, was not in controversy at all in this action. In this point of view, in our judgment, there was no error in the ruling excluding the deed, offered as it was in rebuttal.

There are several other matters alleged as error. We have examined all of them and find nothing in them which warrants a reversal of the order appealed from. It is accordingly affirmed.

We concur: Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 1.

Filed April 19, 1881.

No. 6730.

PACIFIC BANK, RESPONDENT,

VS.

ROBINSON ET AL., APPELLANTS.

PATENT RIGHT—EXECUTION—CREDITOR'S BILL. The interest of a letters patent for an invention may be sold upon execution, and assignment in writing, as required by the laws of the United States, enforced under the State law. Proceedings supplementary to execution are intended as a substitute for a creditor's bill, as formerly in chancery.

Appeal from Fourth District Court, San Francisco.

Winans, Belknap & Godoy, for respondent.

Wheaton & Scrivner, for appellants.

McKEE, J., delivered the opinion of the Court:

Appeal from an order made after judgment upon proceedings supplementary to execution, requiring the defendant to transfer and assign, by a proper instrument in writing, as required by the laws of the United States, all their right and interest in a patent right for broom-sockets, which they hold under United States letters patent, dated October 1874, to a receiver appointed to sell the same, and ap

in satisfaction of a judgment which the plaintiff had
l against the defendant in July, 1879.

objected that the order is erroneous, because United
patent issued to inventors and discoverers under
laws of the United States are not the subject of
sale, and cannot be applied to the satisfaction of a
t.

the law of this State, all goods, chattels, money and
property, both real and personal, or any interest there-
judgment debtor are liable to execution. (Sec. 688,
) And if there be property which cannot be reached
tion, and which the judgment debtor refuses to apply
satisfaction of the judgment, he may be compelled,
amination, in proceeding supplementary to execu-
deliver it in satisfaction of the judgment (Sections
11, C. C. P.), or to a receiver appointed to dispose
aid of the execution: (Sec. 564, *Id.*) The princi-
well as the policy of the law is, therefore, to subject
species of property of a judgment debtor to the pay-
his debts. No species of property would seem to
pt, except such as is especially exempted by law;
property not directly liable to execution may be
for the satisfaction of the judgments. This was ef-
under the old system of practice, by a proceeding in
nown as the Creditors' Bill. After a judgment cred-
exhausted his remedy at law, by the issuance of a *fi.*
h was returned *nulla bona*, he had the right to in-
jurisdiction of a Court of equity to aid him, upon
iple of compelling a discovery of assets, tangible
gible, and applying them to satisfying his execution.
Loeff vs. Brown, 4 Johns. Ch. 671; *McDermott vs.*
Id. 687; 20 Johns. 554.)

edings under Sections 714 to 721, and Section 574 of
of Civil Procedure, were intended as a substitute
Creditors' Bill as formerly used in Chancery. (*Adams*
et al., 7 Cal. 201; *Lynch vs. Johnson*, 48 N. Y. 33.) So
property which was reachable by a creditor's bill
be reached by the process of proceedings suppl-
to execution.

have said, any tangible property is the subject of
nd sale on execution. But a patent right is not
property. It is an incorporeal thing, subsisting in
m the Government of the United States, yet it is
l to some of the legal incidents of ownership of
property, such as succession and transfer; but as a
of legislation it is transferrable only according to

the provisions of the statute which created it, and the question is: Has a Court of equity power to compel assignment and sale for the benefit of judgment creditors?

In 1852 Mr. Justice Nelson, in *Stephens vs. Cody*, 1 U. S., held, that a copyright to print and publish in the State of New Hampshire could be reached by a creditor's bill, and applied to the payment of debts of the owner of the copyright, under a decree compelling a transfer in conformity with the provisions of the Act of Congress. That, however, was mere *obiter*, because the decision on the question was not necessarily involved in the case. Afterwards, in 1854, in the case of *Stephens vs. Glendon*, which was a branch of the case of *Stephens vs. Cody*, Justice Curtis declined to pass upon the question, but neither the copyright nor any interest in it had been attempted to be sold.

But in 1875 the Supreme Court of New York, in the case of *Barnes vs. Morgan*, 3 Hun. 703, took up the *dictum* of Justice Nelson, in *Stephens vs. Cody*, and approved of it as a sustainable legal proposition. An order had been made at Special Term directing the defendant in the case to deliver to a receiver appointed under supplementary proceedings certain patents and models appertaining thereto. The order defendant appealed to the Supreme Court. The validity of the patents by the voluntary act of the assignor under the Act of Congress which created them was not in question; and, according to the authority of *Hesse vs. Stevenson*, 3 B. and P. 577; *Mass vs. Adamson*, 3 B. and A. 25; *Coles vs. Burrow*, 4 Taunt, 754, it had been established that the patent rights of a bankrupt pass by act and operation of law to his assignees in bankruptcy for the benefit of his creditors. In *Hesse vs. Stevenson*, Lord Alverally, in delivering the opinion of the Court, used this language: "It is true that although by the assignment every right and interest in every right of action, as well as right of possession, and possibility of interest, is taken out of the bankrupt, and vested in the assignees, yet that the fruits of a man's invention do not pass. It is true that the schemes of a man may have in his own head before he obtains his certificate, or the fruits which he may derive from such schemes do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his ingenuity and skill, and thereby acquire a beneficial result, which may be the subject of assignment, I cannot find

argument why that interest should not pass in the manner as any other property acquired by his personal Patent rights being, therefore, assignable by the act of the owner, and by act and operation of law, and that a Court of equity could compel the defendant to assign them to a receiver, to be sold and applied to satisfaction of judgments against him, and the Supreme Court affirmed the order of the Special Term. "If," said the Court, "the use of a monopoly which such a grant constitutes sufficiently productive in the hands of the inventor to satisfy his debts, the privilege bestowed, being a right of property as declared by Chief Justice Taney, should be sold to the person designated by law, and sold for the benefit of the creditor. It would be marvelous, if not unjust, to deny the inventor of the ideal, if an inventor, having obtained a patent, thus divulging his secret and at the same time acquiring a property in it for practicable purposes, should be compelled to hold it unused against his creditors, until, by the compromise or the lapse of time, his obligations are discharged; and this, too, although it might be justified, by assignment, or upon manufacture of the thing, would readily yield enough to pay all existing lia-

ties. See *Campbell vs. James*, decided May 1, 1880, in the United States Circuit Court of New York, to which we refer in the argument, is not at all in conflict with the authority of *Barnes vs. Morgan*. This case arose out of a bill in which the defendant was chargeable with the infringement of a patent claimed to be owned by the plaintiff; and the principal questions involved in the case were the validity of the assignment alleged to have been made by the owner, and the right of the plaintiff under it to sue as well for the infringement before the assignment to the plaintiff as after. There is nothing in the case which would take away the power of a State Court in equity to compel the defendant to assign a patent according to the Act of Congress for the benefit of judgment creditors of the owner. Of course the United States Courts have jurisdiction of any questions arising as to the title itself; but as the thing itself is not taken from seizure and sale by the laws of the State, we are bound, on principle and authority, that the order of the Special Term was correct. The Supreme Court affirmed.

Author: McKinstrey, J., Ross, J.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 928.

WILLIAM ASHBURNER, PLAINTIFF IN ERROR,
VS.

THE PEOPLE OF THE STATE OF CALIFORNIA

In error to the Supreme Court of the State of California

Mr. Chief Justice WAITE delivered the opinion of the Court.

In 1864 the United States granted to the State of California the Yosemite Valley and the Mariposa Big Tree Grove, the stipulation, nevertheless, that the State shall accept the same upon the express condition that the premises shall be held for public use, resort and recreation, and shall be inalienable for any time; * * * the premises to be managed by the Governor of the State and eight other commissioners, to be appointed by the Executive of California, who shall receive no compensation for their services. (13 Stat. 325, Chap. 184.) In 1866 the State of California, by an Act of the Legislature, accepted this grant "upon the conditions, reservations, and stipulations contained in the Act of Congress." There cannot be a doubt that from that time these interesting localities were, by the joint act of the United States and California, devoted to a special public use. The title was transferred to California for the benefit of the public as a place of resort and recreation. Without the sanction of Congress the property can never be put to any other use, and the State cannot part with the ownership. It may be called a trust, but only in the sense that all public property held by public corporations for public uses is a trust. It must be kept for the use to which it was, by the terms of the grant, appropriated. If it shall ever be in any respect diverted from that use, the United States may be called on to determine whether proceedings shall be instituted in some appropriate form to enforce the performance of the conditions contained in the Act of Congress, or to vacate the grant. So long as the State keeps the property, it must abide by the stipulation on the faith of which the transfer of title was made.

The management of the property was entrusted by the United States to the Governor of the State and eight other commissioners, to be appointed by the Executive. This is one of the conditions contained in the Act of Congress, to which the State gave its assent when it accepted the grant. The State cannot commit the management to any other Board than this, and

rol the discretion of the Executive in making the appointments; but we see no reason why the State may not set a limitation on the time a commissioner shall hold his appointment. This would be really nothing more than that the Executive revise his appointments at stated intervals. He will be left free to select whom he pleases, and by appointments to continue old incumbents in their places if so desired. His discretion in this respect would be in no manner restricted. This, in our opinion, is all that was done by the Act of April 15, 1880. The term of the office of a commissioner was fixed at four years, but the power of appointment was vested exclusively with the Governor, in whom, under the Constitution, is vested the supreme executive power of the State. The term of the term is that prescribed by the Constitution, and is certainly not unreasonable.

Congress expected the State would, by appropriate legislation, regulate the commissioners in the performance of their duties, by reasonable rules and regulations, not inconsistent with the general purposes of the grant, for their government in the administration of the trust, is abundantly shown by the fact that the acceptance of the grant was considered sufficient, notwithstanding the Act of the Legislature by which it was done. Various provisions of such a character. Among other things, it was enacted that the commissioners should be known in the State as "the Commissioners to manage the Yosemite Valley and the Big Tree Grove," and by that name they and their agents might sue and be sued; that they should have power to adopt all rules, regulations, and by-laws for their government and the government, improvement, and preservation of the property, not inconsistent with the Constitution of the United States or of California, or of the Act making the grant; that any law of Congress or the Legislature; that they should hold their first meeting at such time and place as should be designated by the Governor; that a majority should constitute a quorum for the transaction of business; that they should elect a president and secretary, as well as a guardian of the trust; and that they should report through the Governor to Congress at every regular session.

This was consistent with the conditions and reservations of the grant, and evidently in aid of what Congress intended should be done. So, too, in our opinion, is the Act of 1880. If, as is held here and was held by the dissenting Judge below, that the commissioners were once appointed the power of the Governor over appointments was exhausted until a vacancy occurred by death or resignation, and neither he nor the Legislature could remove a commissioner for cause or otherwise, it is clear that unless some provision was made to guard against the effects of disabilities incident to a life tenure of office, embarrassments might arise in the management of this

important public property. It is entirely unnecessary to whether these commissioners are State officers or State commissioners, within the meaning of those terms as used in the constitutions of the State adopted in 1848 and 1879, and that within the constitutional provision limiting the terms of offices; but we are of the opinion and decide that a law of the State which limits the term of office of a commissioner to one appointment to a reasonable time is not repugnant to the Act of Congress, and may be followed by the Governor in making his appointments. The plaintiff in error had been in office longer than the limited period when the Governor, in the exercise of his discretion, appointed another person in his place. Upon this appointment he should have surrendered his office.

It follows that the judgment of the Court below was correct and it is consequently affirmed.

Abstract of Recent Decisions.

U. S. CIRCUIT COURT—DISTRICT OF OREGON

CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CO-TENANTS. G. conveyed an undivided interest in certain property to H. in trust to secure the payment of a loan from H. with an agreement that G. might remain in possession, and receive the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trust was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose. Upon demand; the note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant H. H. gave him possession, when H. demanded such possession of T., who refused unqualifiedly, and continued to occupy the property and received the rents and profits thereof until the same was sold at a judicial sale at the suit of H. for less than two-thirds of the loan and interest: *Held*, (1) that the interest which G. had in the property, in case the debt was not paid, was not an estate upon condition which was not terminated until a demand for possession, but an estate upon a condition limitation which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid without any demand; (2) that the demand for possession required by the agreement was, under the circumstances, a demand for the purpose of avoiding an estate, and that the demand was insufficient unless made exactly for that which the trust was entitled—nothing more nor less—but was the equivalent

to quit by a landlord upon a tenant at will, and was although in form it may have included the exclusive of the whole property—the refusal being, in effect, a trustee's right to the possession even as a co-tenant; trustee being entitled as co-tenant with T. to the possession of the whole property, and the demand having been made in pursuance of the agreement, it is to be understood as a demand for possession as such and therefore it was not larger than the right of the tenant, and is sufficient, even if it was to have the effect of voiding an estate.—*Walker vs. Teal*, January 10, 1881.

POWER OF DIRECTION TO TRUSTEE TO SELL. A conveyance to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as to construction, so as to effect the object for which it was made and therefore where such a conveyance provided that, in the payment of the loan, the trustee should take and sell the property upon thirty days' notice: *Held*, that the authority to sell was for the benefit of the lender, and the trustee was not bound to sell until he thought best for the benefit of the loan, or was directed to do so by a Court of equity. In the meantime it was his duty to apply the rents upon the debt.—*Id.*

—WHERE MADE. A policy was issued from the office of the plaintiff in Milwaukee, Wis., upon the life of M. E. in Oregon, and forwarded to the local agent there for containing a clause to the effect that the policy was not to be cashed by the company until countersigned and delivered by the agent. The premium paid accordingly: *Held*, that the contract was void in Oregon, that its validity must be determined by the laws of Oregon, and that the plaintiff being then doing business in Oregon the contract was null and void.—*Northwestern Mutual Life Insurance Company vs. Elliott*, 29, 1880.

—OBTAINED BY FRAUD. J. E., the assignee of the afore-mentioned, obtained from the plaintiff thereon the sum of \$10,000 upon the false and fraudulent representation that the plaintiff was dead: *Held*, that notwithstanding the illegality of the contract of insurance, the plaintiff might maintain a suit against J. E. to obtain the money so fraudulently obtained by him.

—OF ANOTHER STATE.—RIGHT TO SUE IN THE NATIONAL COURT. The prohibition by a State that a corporation of another State shall not do business therein, does not prevent such corporation from suing in a national Court in the former State, because such prohibition cannot prevent a foreign corporation from suing in a national Court.—*Id.*

FACETIÆ.

"**Is der brisoner guilty or not guilty?**" asked a Teutonic Justice the other day. "Not guilty, your promptly responded the person addressed. "Den yo get ouet, and go apout your peesiness, my vrend, and s fooling round here mit your blayen off," indignantly re the, outraged arm of the law.

RECENTLY a German woman was assaulted by a negro saloon which the woman kept. She thereupon threw s tles at the negro, and being asked, on the trial of the n the assault, what kind of bottles they were, replied, "T bottles," and the defendant's counsel inquired how a could throw any but Teutonic bottles.

"It surprises me to see a young man like you here Nevada Justice the other day to a fellow who had been v it over night. "You filled yourself up with an enemy t you of brains," proceeded the Court, re-arranging its s and glaring at the culprit. "Now here you are, a yo of intelligence, with good clothes on, and doubtless yo mother and a sister who think a good deal more of yo do. You've been sent to school and taught how to ear living. In return for all this, you go screaming ar streets at midnight, tearing down signs and making a w of yourself. Is that like the conduct of a reasonable No, of course it isn't. Now, I'm going to teach you young man. You needn't turn pale, for it won't help Have you got any chewing tobacco about you? Thanke more and drink less, like I do. You're discharged. N you're tempted to take a drink, think of my kindness a and refrain from the debasing habit. Eh? Well, I do I do. Avery, come out and join me with this young ger

"**HAVE** you engaged, or do you depend
On a lawyer your case to defend?"
Thus to the pris'ner spoke the Judge—
A good man, free from bias or grudge.

"I guess," was the polite reply,
"Thet, with the Court's permission, I
Will jest sorter defend myself—
I ain't dead yit, nor laid on the shelf."

And then that pris'ner grabbed a stool,
And, with a look determined and cool,
He settled the Sheriff with one on the head;
The next thing done was to clear the shed;
And then, without the slightest remorse,
The rascal rode off on the Judge's gray horse

Pacific Coast Law Journal.

I.

MAY 7, 1881.

No. 11.

Supreme Court of California.

IN BANK.

[Filed April 22, 1881.]

No. 10,602.

PEOPLE, RESPONDENT, vs. JACKSON, APPELLANT.

PUNISHMENT—INSTRUCTIONS. In the consideration of a case by a jury, they have nothing to do with the punishment imposed by law. If the jury come into Court and ask concerning the punishment, the verbal instruction by the Judge that they have nothing to do with the punishment is not error, nor within the rule requiring instructions to be in writing or taken down by the phonographic reporter.

Appeal from the Superior Court, San Bernardino County.

Bledsoe, for appellant.

Attorney-General Hart, for respondent.

THE COURT:

The jury had been charged by the Court and retired for deliberation, and afterwards came into Court and inquired as to the least punishment for grand larceny. In making their inquiry, they asked in relation to something with which the Court had nothing to do; and the Court so told them, although at the same time inform them as to the penalty for the crime mentioned.

Appellant objected that this was error because it was not in writing, nor was it taken by the phonographic reporter, and it is contended, the statute required. (See Sec. 1093, Code.)

The Court cannot agree with counsel for defendant. The argument is ingeniously put, but it is not sound. The matter is entirely immaterial as to any issue before the jury, and the objection of the Court amounted only to nothing more than to admonish them to return and find a verdict, if they could do so, regardless of the measure of punishment. This is in accordance with what was held in *People vs. Jackson*, 19 Cal. 426.

The Court held that the jury were influenced by what was said to them by the Court in response to their inquiry is to conclude that the jury were incompetent to perform the duty with which

they were charged, or that they were disposed to discharge their obligation, of which we see no evidence.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed April 19, 1881.]

No. 6880.

DONALD, RESPONDENT, vs. BEALS ET AL.; APPELLANTS.

RECORDING NOTICE—KNOWLEDGE OF ATTORNEY—EQUITY—MORTGAGE TAKE.—It is the duty of a County Recorder to indorse upon an instrument for record the exact time it is received by him, noting the month, hour and minute of its receipt; and to record the same without delay, in the order and as of the time, when it is received for record, and the name of the person at whose request it is recorded. A mortgage is deemed in law to be recorded at the moment of time it is deposited in the office of the Recorder, with the proper office. If there is a conflict between the record of a mortgage as it appears in the record book and the indorsement on the mortgage at the time it was deposited for record, the record book will prevail in favor of a subsequent *bona fide* purchaser. Notice of any fact which would relate to put a prudent man upon inquiry, is, in the absence of notice to the nation, sufficient to charge him with notice of all facts which inquiry would have disclosed. The knowledge of an attorney for both assignor and assignee is the knowledge of an assignee, hence, where the attorney knew that the assignor's mortgage was recorded subsequent in time to plaintiff's, i. e., was subsequently indorsed by the Recorder for record: *Held*, that defendant was bound by the knowledge of his attorney. A Court of equity has power to correct any and all mistakes growing out of the improper recording of a mortgage.

Appeal from Twelfth District Court, San Mateo County.

Fox & Ross, for respondent,

Earll & Firebaugh and *Moore*, for appellants.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action in equity, to obtain a decree that a mortgage, given by the defendant Beals to the plaintiff, is entitled to priority or lien over a mortgage given by him to the defendant Newell, which has been assigned to the defendant Crane, and to compel the Recorder of San Mateo County to correct the date of the record of the mortgage.

The Court below found in favor of the plaintiff, and the decree and an order denying a new trial the defendant Crane brings the case before us on appeal.

It appears, by evidence in the transcript, in which there is no substantial conflict, that the defendant Beals, on the 1st of March, 1878, being indebted to the plaintiff Donald

promissory note, for the sum of \$3,000, payable one year after date, executed to him a mortgage upon certain lands in Placer County, to secure the payment of the same, and on the 10th day of March, 1878, being also indebted to the said Mrs. Newell, by a promissory note for \$2,000, payable after date, he executed to her a mortgage upon the same lands to secure its payment.

When the mortgages were given in renewal of subsisting mortgages upon the same lands in favor of the same parties, the causes of action on those were about to expire. In this situation, Beals proposed to renew them in the same manner in which they had been recorded—the Donald mortgage being the first. To this the mortgagees assented; and it was expressly understood and agreed between them that the first mortgage to Donald should be first executed and recorded so as to constitute a prior lien upon the lands. In accordance with this arrangement, Beals executed the mortgages. He first stated—the Donald mortgage on the 27th, and the Newell mortgage on the 30th, of March, 1878. Both mortgages were acknowledged by the mortgagor on the 8th day of April, 1878, and on that day Mrs. Newell satisfied her first mortgage by releasing the same on the same day of the record of the mortgage. That being done, the new mortgages were afterwards, viz: on the 15th day of April, 1878, deposited for record in the Recorder's office in Placer County in the following order of time, the Donald mortgage at 4 o'clock P. M., and the Newell mortgage at 5 o'clock P. M. And on the same day satisfaction of the first Donald mortgage was also entered. At this point the arrangement and understanding of the parties had been faithfully executed. Mrs. Newell had released her old mortgage on the eighth of April, 1878; Donald released his until the fifteenth day of April, but both mortgages were deposited in the Recorder's office on the 15th of April, the Donald mortgage an hour before the other. At the time the mortgages were thus deposited it was the duty of the Recorder, under the law, to indorse upon each of them when it was received by him—noting the year, day, hour and minute of its reception; and to record each without delay, in the order, and as of the time, when it was received for record; and he was also required to enter at the foot of the record of each, the exact time of its recording, with the name of the person at whose request it was recorded. (Section 4241, Political Code.) This duty was performed by indorsing on the Donald mortgage that it was deposited for record April 15, 1878, at four

o'clock p. m. But the Court below finds that the note the date was "hastily and carelessly written, and read for April 18 instead of April 15, the true date of filing, indorsement, and recording of the same." As a fact, it was indexed and recorded before the Newell mortgage, but, in transcribing it in the mortgage book, the Recorder made a mistake, noted at the foot of the record that it was recorded April 18, 1878, and this mistake he carried into the certificate of registration, which he annexed to the mortgage, so that it was made to appear that the mortgage had been recorded on the eighteenth day of April, 1878, when, in fact, it had actually been recorded on the fifteenth—an hour before the Newell mortgage. A mortgage of posteriority of date and lien, thus, by the appearance of the record, given precedence to one priority of date, and entitled to priority of lien.

But the Donald mortgage was deemed in law to have been recorded at the moment of time when it was deposited in the Recorder's office with the proper officer for record. (See *St. v. Donald*, 1170, C. C.) Therefore, the indorsement made upon the mortgage by the officer at the time of the deposit was as effectual for the purpose of registration as though the mortgage itself had been transcribed in the proper book of the Recorder's office.

Yet there is a conflict between the actual record, as it appears in the record book, and the constructive record created by the indorsement made upon the instrument, at the time it was deposited for record, the latter must give way to the former, unless those dealing with the former had notice and knowledge of the latter. For the law protects those who, in good faith, acquire title or security upon land upon the faith of the record, and it would not allow slight circumstances or mere conjecture to overthrow rights *bona fide* acquired by deeds or mortgages appearing first on record. Courts of equity grant no relief against such purchasers, because they have, at least, equal rights. But where one acquires a right with notice of the existence of a prior equity, in conflict with the right which he acquires, he is not considered an innocent purchaser. Nor can good faith be predicated of a transaction which is merely colorable.

Now the assignment of the Newell mortgage was made under the following circumstances, viz.: Mrs. Newell, finding that the Donald mortgage had been first deposited for record, had commenced an action against Beals alone to close her mortgage, upon an optional clause in the mortgage that the entire debt should become due in default of payment of the interest as it became due; and in the same action she had filed a *lis pendens*. But, while the action was

orney, "who had heard that the Donald mortgage lien upon the land," had discovered, by an inspection of the records, that her mortgage, according to the records, in fact, first recorded, and suggested to her the propriety of asking her "why she was so foolish as to go to the trouble of changing her mortgage for Donald's benefit, when her mortgage was in fact a second mortgage." She hinted she answered, that "she did not know whether it was so or not, but she wished he would go and look accordingly took from the records a memorandum of the recorded dates of the two mortgages and showed it to her. She then engaged him to make a more complete abstract of the facts for her use, and upon receiving the assigned her note and mortgage to the defendant and upon a recordation of the assignment, dismissed the action to foreclose. The attorneys in that action are the attorneys for the assignee in this, and by them it is shown in his behalf, that in taking the assignment he was an innocent purchaser, bought, in fact, without notice of the equity of the plaintiff, and in good faith. But the law does not sustain him in that character. All the circumstances attending the assignment show that he had not at all events, a knowledge of facts which were sufficient to put him, as a prudent man, upon inquiries which would have led him to the truth existing in the knowledge of the plaintiff or of her attorney. But he made no inquiries of the assignor or attorneys either about the mortgage itself, nor whether he had consented to buy, or the title to the mortgaged property—rather, indeed, studiously avoided making inquiries of the assignor and the attorney were as studiously silent on the subject. Negotiations for the purchase of the property he had none to speak of. The entire transaction between him and his assignor seems to have been hurried along more by the nervous haste of conscious pressure than by the calculation and deliberation of business. She gave him a promissory note of \$500, and after she had given herself that there was a mistake in the record of the mortgage, she, one day, proposed to sell him her mortgage against Beals. He consented to buy. He said in his testimony, "the title was perfect and clear; if it was, he did not know but that he would." But she did not inform him that the Donald mortgage was first recorded; but, she says in her testimony, "I knew nothing about it, and that he must go to the records. Yet to the records he did not go. If he had gone he would have found the relative dates and liens of the

old mortgages between the same parties, the respect of their satisfaction, and the respective dates of mortgages given in renewal of the old. He would have the fact that the new mortgage to Donald had been first, and had been first indexed by the Recorder in the proper book of the records of his office, and that Newell had commenced an action to foreclose her mortgage against the mortgagor alone, in which she had sworn the whole amount mentioned in her note and mortgage then due and owing to her. He would have thus ascertained that he was about to purchase a chose in action past a mortgage subsequent in date to one also recorded prior in date and first indexed by the Recorder, although the notation of the record it appeared to have been subsequently recorded. These facts would have led him to the truth if he had made further inquiries. But he failed to make them. He got the abstract of the dates of the notation of the two mortgages from the attorney, and looking at it, consented to take the assignment. He asked no questions about the abstract itself, or the mortgage, or the title to the mortgaged property. "I went," he said in his testimony, "according to that abstract, as the attorney had searched the record and said that that was correct. I acted wholly on everything that the attorney said in determining whether the title was good or not." Yet the abstract itself showed that the plaintiff's mortgage was prior and that it was recorded subsequently to the other mortgage only "as appears by the record." No explanation was asked why that expression was inserted in the abstract in connection with the plaintiff's mortgage and not with the other. But without any examination of the record, the title, and without any inquiries from those with whom he was dealing as to facts, he blindly purchased a \$2,000 mortgage upon the face of a meagre abstract or memorandum of dates of two conflicting mortgages. It is difficult to see how, under such circumstances, he can claim to be an innocent purchaser.

Everything in connection with the mortgage itself, the abstract which he got from the attorney, and upon the face of which he claims to have purchased, put him upon inquiry. They notified him of something beyond. It was such a fact as would have led any honest man, using ordinary care, to make further inquiry before purchasing. Notice of the fact calculated to put him on inquiry, is, in the absence of explanation by him, sufficient to charge him with notice of all instruments and facts in connection with them, with

ould have disclosed. The rule is thus stated by Sel-
Williamson vs. Brown, 15 N. Y. 362: "That when
er has knowledge of any fact sufficient to put him
as to the existence of some right or title in conflict
he is about to purchase, he is presumed either to
the inquiry and ascertained the extent of such prior
to have been guilty of a degree of negligence
tal to his claim to be considered as a *bona fide* pur-

, the attorney who prepared the abstract acted as
both assignor and assignee. He had acquired a
e of the fact of the priority of the registration of
ff's mortgage. He knew it when he suggested it
ewell, and when he was preparing the abstract for
or he called the attention of the Recorder to the
f the record as a mistake. He admits that he "did
on the fact to any one, and did not mention it in
ct," but he seems to have purposely concealed his
of the fact by the expression: "As appears by
," which he used in the abstract. Acting as he
capacity as attorney for searcher for both the as-
signee, it was his duty to make his knowledge
the assignee. The knowledge of an attorney is the
knowledge of his client. It is a well-settled doctrine
law, that if the agent, at the time of effecting a
have knowledge of any prior lien, trust or fraud
the property, no matter when he acquired such
, his principal is affected thereby. "The gen-
said Mr. Justice Bradley in *The Distilled Spirits*
Vall. 367, "that a principal is bound by the knowl-
s agent, is based upon the principle of law, that
agent's duty to communicate to his principal the
e which he has respecting the subject matter of ne-
and the presumption that he will perform that

, it results that the appellant was not a purchaser in
a of the mortgage in controversy, and that the
ow did not err in adjudging the priority of the
lien of the plaintiff and in correcting the mistake
the notation of the record thereof. Of the power of
equity to reform a mortgage by going back to the
mistake, and correcting all subsequent mistakes
w out of it, there is no question. (*Quivey vs. Baker*,
5.)

nt and order affirmed.

cur: McKinsty, J., Ross, J.

DEPARTMENT No. 1.

[Filed April 19, 1881:]

No. 6483.

LOREN COBURN, RESPONDENT,

VS.

J. P. AMES ET AL., APPELLANTS.

RECEIVER—PRACTICE. The appointment of a receiver pending litigation does not oust a party of his right to the possession of property and the benefits; the receiver merely holds possession for the benefit of the party ultimately adjudged entitled to the property: *Held*, according to the decision of the Supreme Court, that after the adjudication that defendant was entitled to a portion of the premises in controversy, it was error to order the delivery of the property to a receiver of all moneys in his hands collected from the use of the property to plaintiff. A receiver having been appointed to collect tolls cannot say that he collected tolls wrongfully, but he must account for all tolls by him collected. The irregularity of discharging a receiver without notice is no ground for reversing the order directing him, it appearing that the rights of the parties had been settled by a judgment of the Supreme Court in the cause.

Appeal from Twelfth District Court, San Mateo County.

John J. Williams, for respondent.*Fox & Kellogg*, for appellants.

MORRISON, C. J., delivered the opinion of the Court.

The plaintiff brought an action in the District Court against the defendant for the recovery of the possession of certain lands described in the complaint, and also of a portion or chute thereto attached or connected therewith, and obtained judgment on the fifteenth day of June, 1870. On that judgment an appeal was taken to the Supreme Court on the seventeenth day of the same month. After the appeal was heard and before the hearing in the Supreme Court—that is to say, on the twenty-second day of July, 1876—the District Court made an order appointing a receiver to take possession of the property in controversy, to collect the tolls, and generally to manage the same. On the ninth day of October, 1877, the Supreme Court rendered its decision and judgment on appeal, and it was by that Court “ordered that the judgment be and is hereby modified by striking so much therefrom as includes the wharf and chute below the line of water, and in other respects the judgment is affirmed.” On the eighteenth day of March, 1878; the judgment of the District Court was modified in accordance with the modification of the Supreme Court.

Supreme Court. On the twenty-ninth day of that month, in the absence of, and without notice to, the defendants and their counsel, the Judge of the District Court caused to be entered in the minutes of the Court an order discharging the receiver "from all and singular the duties imposed by the order of this Court, except the accounting of the wharf in the receivership aforesaid." On the twenty-ninth day of March an application was made on behalf of the defendants to set aside the order discharging the receiver and for an order commanding him to restore the possession of the wharf and chute to the defendants, which application was denied by the Court on the eighteenth day of April, 1879.

On the ninth day of October, 1878, the receiver filed his return from which it appeared that the balance in his hands was \$7.45; and on the eighth day of January, 1879, an order was entered settling the accounts of the receiver, and directing him to pay over the balance of money in his hands to the plaintiff. From these several orders the defendants appealed to this Court.

The ground of error alleged is that the receiver was discharged without notice to the defendants, and without requiring him to re-deliver the possession of the wharf to the defendants. It would have been proper practice to have notified the defendants before discharging the receiver. Mr. Daniell, in his book on Chancery, Pleading and Practice, vol. 2, page 100, says: "A receiver, however, is never discharged by the Court until the application for his discharge is usually made by the plaintiff, whereof notice should be served on all parties." It is said, however, that the irregularity was such as to constitute a reversal of the order.

The rights of the parties had been definitely settled by the judgment of the Supreme Court, and it was proper for the Court below to discharge the receiver after notice; and it was no error to deny the application made on behalf of the defendants to restore the receiver to the possession of the wharf after the rights of the respective parties had been determined by the judgment of the Supreme Court. It is said that there was error which entitles the defendants to a new trial in this Court, when the Court made its order of March 28, 1879, settling the receiver's accounts. The receiver was the officer of the Court, "and truly the hand of the Court." His holding is the holding of the Court for him, and the possession was taken. He is appointed on behalf of all parties, and not of the plaintiff or of one defendant only. His appointment is not to oust any party of

his right to the possession of the property, but merely to retain it for the benefit of the party who, may ultimately appear to be entitled to it; and when that is ascertained, the receiver will be considered as his receiver." (*Ellis v. Warford*, 4 Maryland, 85; *In the Matter of Rachael Co. Id.* 303; *High on Receivers*, Sec. 837.)

In this case it was held by the Supreme Court that the plaintiff was not entitled to the possession of the wharf and chute, and it would be strange doctrine to hold that the plaintiff, nevertheless, is entitled to the profits derived from the use of them pending litigation. On the authorities above cited, it should have been held that the receiver was in possession of the land for the benefit of the plaintiff, and of the wharf for the benefit of the defendants. The appointment of a receiver oust any party of his right to the possession, but he is appointed merely to retain the property for the party who might ultimately appear to be entitled to it. When the Court determined that the plaintiff was only entitled to the use of the land, that determination certainly did not establish any right in him to the profits arising from the wharf; and it was error on the part of the Court below to award him all the profits from both the land and the wharf. The report of the receiver shows that "the entire amount of cash received from the above sources, and which has constituted the gross receipts of such chute for the period named, amounted to one thousand one hundred and twenty-six dollars and forty cents." From this gross amount certain deductions were made and certain credits were claimed, which were approved by the Court, and it was ordered that the entire balance should be paid over to the plaintiff. We think this was error.

The principle above announced is not affected by Section 2913 of the Political Code, which declares that, until title to lands is obtained in the manner provided by law, there is no authority to construct a wharf, chute or pier, or to collect tolls thereon."

It may be that the tolls were collected under circumstances which did not justify their collection, and therefore they could not have been collected if the parties paying them had refused to pay; but they were in fact collected by the receiver when he, as the hand of the Court, held the property for the benefit of the defendants, and the receipt of the tolls by him was a receipt for their benefit, in part at least. We will not attempt to adjust the rights of the parties to the money in the hands of the receiver; and the extent of this opinion is, that the Court below erred in awarding

all of the moneys remaining in the hands of the
 of January 8, 1879, reversed and cause remanded,
 instructions to adjust the accounts in accordance with
 ion.
 neur: McKee, J., Ross, J.

IN BANK.

[Filed April 22, 1881.]

No. 10,617.

PEOPLE, RESPONDENT, VS. DYE, APPELLANT.

OF JURY—CONFLICTING AFFIDAVITS—BILL OF EXCEPTIONS—EVI-
 DENCE.—Affidavits on the question of misconduct of the jury being
 dicting the rulings of the Court below will not be disturbed on ap-
 A bill of exceptions, stating that "each party introduced evi-
 e to sustain the issue on their parts" is sufficient. If a more
 ular insertion of the testimony is required, it must be set forth
 e party desiring it. The objection that the verdict is contrary
 e evidence is not tenable where the bill of exceptions recites that
 party introduced evidence tending to sustain the issues.

from Superior Court, Los Angeles County.

White, for appellant,
 ey-General Hart, for respondent.

COURT:

idavits and counter affidavits of the jurors were con-
 y. The counter affidavits denied the statements in
 vits of the moving party and showed that the jurors,
 and fair deliberation, arrived at a verdict. This
 onclusion of the Court below, and we ought not,
 e circumstances, to disturb that ruling. That Court
 there was no misconduct of the jury, and we are of
 opinion. We do not intend to admit by what is
 ve that the affidavits referred to were admissible to
 the verdict.

ll of exceptions shows that evidence was before the
 he issues, on which it had to pass. It is stated in
 hat each party "introduced evidence to sustain the
 their respective parts"—which signifies, in our
 t, that each party offered evidence *in order to*, or
 rpose of, sustaining the issues on his part. This
 gh without any further setting forth of the testi-
 The evidence on the material issues was before the
 appears from the statement referred to, and on such

evidence a verdict of guilty was reached. We see erroneous in this. If the defendant desired to have particular insertion of the testimony he was at liberty to have had it done by setting it forth in the bill. The statement made in the bill was insufficient to show that there was evidence before the jury on which to base a verdict. That it was not so is an entire misconception on the part of the defendant's counsel. With this statement and none other in the bill of exceptions in regard to the evidence introduced, we cannot see that the objection that the verdict is not supported by the evidence is at all tenable.

What is said above, in our view, is in entire accord with what is held in *People vs. Fisher*, 51 Cal. 319, and *People vs. English*, 52 Cal. 211.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed April 19, 1881.]

No. 7607.

F. J. CLARK,

VS.

A. M. CRANE, JUDGE OF THE SUPERIOR COURT OF THE
COUNTY OF ALAMEDA.

MANDAMUS—EXTENSION OF TIME—PRACTICE. After the time within which a party must file and serve notice of motion for a new trial has expired, the Court has no power to grant an extension. If there is no motion for a new trial there can be no settlement of a statement of such motion. Orders granting extensions of time to prepare and serve notice of motion for new trial and statement, and orders refusing to settle statements are special orders made after the trial and are not appealable. Mandamus will not lie where the proper remedy is plain, speedy and adequate remedy by appeal. The writ of mandamus will not issue where the effect of granting it would be to set aside a verdict and useless thing.

Application for writ of mandate.

A. H. Griffith, for petitioner.

Fox & Kellogg, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an application by F. J. Clark for a writ of mandamus to the Hon. A. M. Crane, Judge as above stated, compelling him to proceed to settle the statement and bill of exceptions in the case of the Pacific Mutual Life Insurance Company against the above applicant Clark, and to pro-

otion for a new trial after said statement has been

Following are the facts which appear and on which
lication must be decided. A trial came on in the
ve named before the Court (the Judge aforesaid pre-
nd a jury. A verdict was rendered for the plaintiff
ghth day of December, 1880, and on the same day
of the verdict was made in the minutes of the Court.
tely after the entry of this verdict, and on the same
following order was made and entered:

otion of the defendant's counsel it is further ordered
ay of execution for the space of thirty days be

er order in relation to any stay of proceedings than
ever at any time made by the Court.

e twentieth of December, 1880, the attorney of de-
Clark applied to the respondent at chambers for an
nting the defendant five days further time in which
e and serve notice of motion for a new trial in said
On making such application the counsel stated that
e last day for giving said notice, and offered some
which was not remembered by the Judge, but which
ed sufficient, for not having made an earlier applica-
nat, relying on this statement and not remembering
e verdict was rendered, he improvidently granted an
ending the time to prepare and serve said notice.
rder made by the Judge on the twentieth of Decem-
), defendant was allowed five days from said day to
and serve the notice aforesaid. On the same day
e, on the application of defendant's counsel, made a
rder allowing the defendant ten days from the day
tioned to prepare and serve a bill of exceptions or
t in the said action.

e twenty-fourth of December, 1880, the defendant
ad filed a notice of motion for a new trial, and on the
f January, 1881, he obtained from the Judge a
rder extending the time two days from that day in
propose and serve a statement on this motion. On
day defendant served the proposed statement on the
s for plaintiff, and on the fifteenth day of the same
ne plaintiff in the cause served amendments pro-
it to the statement. In proposing these amend-
plaintiff reserved the right to object to the hearing of
on for a new trial, and to the use on said hearing of
t's said notice of motion and his proposed statement,
ound that the said notice and statement and each of

them were not served or filed within the time required by law or any valid order of the Judge, and to object on other grounds as he might be advised, and expressly to waive any right in regard to the matters just above mentioned.

On the eighteenth of January, 1881, defendant Clark served notice on the attorneys of plaintiff that he would adopt the proposed amendments, and that the statement of amendments would on the twenty-fourth of January be presented to the respondent for settlement. The day of the said settlement came on to be heard before the Court on the day last named, on which day it made an order as follows:

“PACIFIC MUTUAL LIFE INSURANCE COMPANY,
vs.
F. J. CLARK.

} Monday, Jan'y 24

This cause coming on to be heard on the application of defendant to the Court to settle the statement on motion for a new trial, the plaintiff, by its counsel, protested against the Court taking any action thereon, on the ground that no notice of motion for a new trial had ever been given as required by law. It appearing to the Court that the verdict was rendered and judgment entered December 2, 1880, that no notice of motion for new trial was given until the twenty-fourth of December, 1880, and no order extending the time for filing notice until December 2, the Court now holds that it has no jurisdiction in the matter and hereby denies said application to settle the statement. This order was entered in the minutes of the Court, and is a Court order.

On behalf of the application for the writ, it is urged that the proceedings on behalf of defendant were regular and were in time. As above stated, the verdict was rendered on the eighth of December, 1880, and on that day a stay of execution for thirty days was ordered on motion of defendant's counsel. No further steps were taken until the twentieth of the month named, when an order was passed allowing five days from that date to prepare and file notice of motion for a new trial. This order, it is contended by defendant, is regular and valid. As to this we are referred to Section 1054 of the Code of Civil Procedure. That section provides that “when an act to be done, as provided in this Code, relates to the * * * preparation of statement or of bills of exceptions, or of amendments thereto

appeal, the time allowed by this Code may be extended upon good cause shown, by the Court in which the appeal is pending, or the Judge thereof, etc.; such extension, however, is not to exceed thirty days without the consent of the adverse party."

A party intending to move for a new trial has a period of ten days after the verdict of the jury within which to file a motion with the Clerk and serve upon the adverse party a notice of his intention to make such motion. (C. C. P. Sec. 659.) The purpose of the section is strong—it uses the words "must within ten days" take this step. If he does not give such notice within the period above mentioned, his right to move for a new trial is lost.

The Court or Judge can extend the time under Section 1054 above cited, but such extension must be granted within the period of ten days, or within such other period as the Court may determine, while the right to give such notice is still alive. When the right to give such notice is gone, giving further time would not be called an extension of the time, but it would be in effect reviving a right which no longer exists. In such cases, when such right to give notice is gone, there is no period of time to extend. The time ends with the expiration of the period which the law allows for giving such notice, and when that time ends, to hold that the Court or Judge can extend the time would be to affirm that the Court or Judge can dispense with the requirements of the statute. We are all of opinion that the Court properly held that the period of ten days having expired when the order of the 20th of December, 1880, was made, extending the time to give the notice of motion, the Court no longer had jurisdiction in the matter, and that the order was void for no force or validity. (*De Castro vs. Richardson*, 25 Cal. 105.)

Notice given was then in fact no notice. As the notice was not given, the foundation of the whole proceeding upon which it was based failed, and there being no notice, when the further order was made on the day just above mentioned, extending the time to prepare and serve a statement, such order was likewise void.

It is said that it was the duty of the Judge to have set aside the statement that the defendant might have an opportunity to prosecute his motion for a new trial, and, if denied, to remand the whole matter before this Court for review, through the writ of appeal; and to sustain this contention, we are referred to *Quincy vs. Gambert*, 32 Cal. 304. In that case the plaintiff recovered judgment in the Court below. The defendant moved for a new trial and filed a statement. The motion of plaintiff's attorney, struck the statement

from the files. The defendant appealed from this. On motion of the respondent the Supreme Court dismissed the appeal, on the ground that such an order, though made after final judgment, was not appealable, following the cases cited in the opinion.

This would ordinarily have ended the cause in this court. But the Court entered into a discussion of the proper mode of procedure in such cases, and held that the practice of striking out the statement was irregular, and without the sanction of any provision of the statute. The opinion concluded with advising the Court below to set aside its order striking out the statement, and to allow the motion for a new trial to proceed to a hearing on the statement, as if the party had complied with the statute in all regards. The party who has recovered judgment is also advised as to the course he should pursue in order to save his right. One of the learned Judges dissented from the conclusion reached by the majority. This cause was subsequently reviewed in the case of *Culderwood vs. Peyser*, 42 Cal. 110. In this case the Court came to the conclusion that an order striking a statement from the files of the Court made after final judgment was not an appealable order, and, as to this point, overruled *Quinn Gambert*—one of the Justices, who had participated in the ruling thus disposed of, dissenting. It is unnecessary to review the reasoning of the opinions in the two cases referred to, but we are satisfied with the conclusion reached in *Culderwood vs. Peyser*, which has been acted on ever since. We will merely state here that the statute at that time, which now does now, gave an appeal "from any special order made after final judgment (Prac. Act, Section 336; C. C. Act, Section 939), and that the law-makers seemed to have had the opinion that any order was sufficiently within the limit of the procedure, when it came in the order of succession defined in the statute, viz., after final judgment.

If the order before us was one striking the statement from the files, there is then a remedy by appeal, according to the rule established by the case just above cited. This is generally regarded as fatal to an application for a writ of habeas corpus, and has been in this State repeatedly so held. See *Peralta vs. Adams*, 2 Cal. 595; *Fremont vs. Merced*, 1 Cal. 18; *Ludlum vs. Fourth District Court*, 9 Id. 13; *Mannix*, 15 Id. 149; *People vs. Sexton*, 24 Id. 84; *C. Minnis*, 50 Id. 509.

The orders under consideration are special orders made after final judgment was entered on the 8th of December, 1880, and the orders in question were not made u

that month. These orders are likewise appealable under the provisions of the Code. They are as much special orders as striking a statement from the files, and, therefore, under the rule of *Calderwood vs. Peyser*, are appealable. If they do not appear on the record, they may be made to appear by bill of exceptions, as was held in *Tieper vs. Cennedy*. (opinion filed October 9, 1880), and the whole matter brought here by the ordinary process of appeal.

It may be said that where the remedy by appeal is not a complete and adequate remedy, then the writ of mandate should issue. This was so held in *Merced M. Co. vs. Fremont*; 30.

It is not admitting for the argument that the remedy by writ is the proper one by reason of the fact that the remedy by appeal is not plain, speedy and adequate, does it follow that the writ must go in such a case as this? Do the facts in the case here presented entitle the applicant to the writ? We are all of opinion that where the facts show that the court below has no longer jurisdiction to act in the matter, the writ should be denied. Why compel the settlement of the case when the facts show that if the statement was granted, the motion heard and the new trial denied, so that the case might be prosecuted from it, the order of the court below must be affirmed, because the party had lost his chance to move? Or if the new trial was granted, that on appeal the order would be reversed, for the same reason. The result of the appeal must be fatal to the claim of the party moving. The facts are all fully before us on this writ, and they show that the new trial must be denied, because the court has no longer power over the case. And if such facts are shown, the hearing of the writ that such must be the result, because the cause must end adversely to the pretensions of the party moving, why not so declare on such application and relieve the party from any further expense, trouble and delay in the prosecution of an useless appeal? The facts can be ascertained on this application as well as on an appeal. It may be said that the result would not be the same. Then let the court announce such result, adjudge that the party cannot obtain the writ to order a Judge or Court to do an utterly vain and useless thing—that the performance of the act sought to be compelled here, does not result as a duty from the office, or station of the Judge, or rest upon the Court, for the fact that, owing to a non-observance of the requirements of the law as to time, the duty or obligation no longer re-

Mr. Broom in his very excellent work in explanation

and exposition of Legal Maxims: "It is a maxim legal authors, as well as a dictate of common sense, law will not itself attempt to do an act which would *nex nil frustra facit*, nor to enforce one which would *olous—lex neminem cogit ad vana seninutilia*." The not, in the language of the old reports, enforce any or a thing which will be vain and fruitless." (See Legal Maxims, "*Lex non cogit ad impossibilia*," 6th A 248-9, citing 3 Johns., per Kent, J., 598; 5 Rep. 2 Litt. 127 b. cited on argument, 2 Bing. N. C. 121 (H R. 29); Wing Max. 600; *R. vs. Bishop of London*, 21 per Willes, J.; *Bell vs. Midland R. R. Co.*, 10 C. B. (E. C. L. R. 100). The citations show the limitation application of the maxim. (See, also, *Teel vs. Swe Johns*. 184.) As is remarked by Kent, J., in the case cited from 3 Johns., "it has hitherto been considered settled principle that a Court will not undertake to exercise power, but when they exercise it to some purpose."

An issue was made by the petition and answer in this cause, as to the orders of the Court below, which are mentioned above, and an order was made by this Court reversing the matter to determine what orders were actually made by the Superior Court. The referee seems to have expressed an opinion that he had to take oral testimony to determine the fact, whereas an inspection of the records of the Court would be only necessary. This Court knows of no authority which would change the orders of the lower Court in such a case as this one before us, by oral testimony or any other mode. If an order is incorrectly entered, and a correction is desired, an application must be made to the Court which made the order, and it is known of no means that this Court has to correct such orders if any exist. Every Court must be the guardian of its own records, and their correctness must be conclusively presumed in this Court. (*People vs. Judge of Tenth District*, 9 Cal. 21.) It was entirely useless to have taken oral testimony as to such orders. The records of the Court are the best and only evidence of the orders made. If any correction had been made by the Court in the entry of the order, we have no doubt they would have been promptly corrected by that Court on a proper proceeding. Unquestionably the alleged mistake has been corrected by that tribunal, and we must accept them as they come to us from the records of that Court.

From what has been said above, our conclusion must be that the writ be denied, and it is so ordered.

We concur: Myrick, J., Sharpstein, J.

In the Superior Court,

IN AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

DEPARTMENT No. 5.

POLACK ET AL. VS. CLINTON GURNEE ET AL.

DECISION.

BREED SCRIP, issued under Act of Congress of July 17, 1854, locatable on occupied public lands in any State or Territory; such location can only be made on lands subject to pre-emption; and the right of pre-emption can only be exercised on unsettled, unoccupied public lands:

When located by an attorney in fact, must be accompanied by a certificate of attorney authorizing the location, etc., in all cases; if not so accompanied, the location is void:

Act of September 4, 1841, granting to the States respectively 100 acres of land, operated as a grant in *presenti* to the State of California of that quantity of land to be selected by the State, etc.:

State under this Act and under the State laws has once made a location of any particular land subject to location, the title to such interests in the State at once on such selection:

Location was located on the Geyser Springs at the time the springs were in occupation of a purchaser of the same from the State of California under said Act, there being thereon at the time of such location mineral and other valuable improvements; this location held void:

Selection of the same by the State in behalf of said purchaser, the same had been surveyed by United States, held valid as a location of surveyed land, etc.

Cobb and James F. Stuart, attorneys for plaintiffs.

A. Nourse, attorney for defendants.

Mr. J., delivered the opinion of the Court:

An action to recover the possession of the northeast Section 13, Township 11 N., R. 9 W., situate in the County of Sonoma, and embracing the property known as the

Location was commenced in 1871, and since that period amended and supplemental complaints and answers have been filed therein, rendering it a work of great difficulty to state what are precisely the issues now involved in the case. The complaint in substance, however, alleges that the land in question is a portion of the five hundred thousand (500,000) acres of school land granted to the State under the Act of 1841; that Mary Polack and her grantors in 1854 and 1862 located school land warrants upon the land in question, and that, after, to wit, in December, 1862, the certificate of purchase was duly issued by the State to her; that the question was unsurveyed public lands until and after September 4, 1867; that on the 14th of January, 1867, an official map of the survey of the township in question was made and filed in the San Francisco Land Office; that

on the day following the said Mary Polack caused the question to be selected through the State Locating agent on her behalf; that at the time of such State application the land in question, according to the official United States survey, near the mouth of the river, was the north half of section thirteen and the north half of section fourteen; that on or about the 14th day of July, 1868, the defendant Chapman, as the attorney in fact for the Indian named Freniere, attempted to locate upon the land in question certain Sioux half-breed Indian scrip, issued under the Act of Congress of July 17, 1854. The complaint upon the said application was in fact made in the month of July, 1868, but that upon false representations made by said Chapman, he induced the local officers to enter such application as of the 14th day of July, 1868; that thereupon a contest arose between the State and State location; and while said contest was going on, said township map was withdrawn from the local Land Office by the Surveyor-General of the United States, and that the map after remaining suspended until August 29th, 1874; that notwithstanding the withdrawal of said map, and the consequent suspension of the contest between the parties, that Chapman made application to the General Land Office for a patent for the land upon the location of said Sioux scrip, and thereafter, on the 1st of June, 1869, obtained a patent therefor; that at the time of the issuance of such patent Chapman knew of the claims of the plaintiff Polack to the land in question, and that the plaintiff had been in possession thereof for many years, and had erected costly improvements thereon, and was claiming the same thereto under and through the State; that said patent was issued to said Daniel Freniere, who conveyed to the defendant Chapman, who in turn deeded to the defendant Chapman; that the plaintiff was in possession of said land from the year 1861 to December 30th, 1869, when the defendant Gurnee took possession of such land and removed her therefrom; thereupon the plaintiff, said Mary Polack, commenced an action against said Gurnee and others to recover the possession of the property, and thereafter, to wit, in March, 1870, judgment was entered in her favor therefor, and the defendant Gurnee removed from said land; that upon appeal said judgment was reversed, and in the year 1872 defendant Gurnee was restored to the possession of said land.

When this action was originally commenced the plaintiff was in possession of the land in question, having been restored to such possession by virtue of the judgment above referred to, but subsequently, after their dispossession, upon the reversal of the said judgment by the Supreme Court, the plaintiff hereupon filed an amended complaint wherein the fact of such dispossession was alleged, and in addition to the relief sought in the original complaint, the plaintiff demanded judgment for the p

premises, and for damages for the use and occupation of the premises and the improvements thereon.

Recently a supplemental complaint was filed herein, in which it was alleged that subsequently to the filing of the original complaint, the Register and Receiver of the United States Land Office for San Francisco, wherein the contest between said scrip location and said Mary Polack was pending, filed said contest against said scrip location and in favor of said Mary Polack, holding that said former location was void and void; that said findings and decision of the Register and Receiver were duly affirmed by the Commissioner of the General Land Office, and subsequently by the Secretary of the Interior. Said supplemental complaint further alleged that subsequently, to wit, in May, 1879, after proceedings duly had in the United States Circuit Court for that purpose in a certain case wherein the United States were plaintiffs and said Chapman was defendant, the patent issued to said Freniere, and the same referred to, was by said Court adjudged to be null and void and was thereupon canceled.

The answers in the case have failed to traverse many of the facts of the verified complaint, and upon the trial consideration was offered by the plaintiff which, in my opinion, was necessary in view of this fact.

The proofs showed that in 1854 one Godwin employed the then County Surveyor of Sonoma County, to make a map of the land in question, and that he thereupon located, and caused to be located, two school land warrants owned by the State for 320 acres each on a tract of land including the land in controversy; that by mesne conveyances and assignments the title of Godwin to said premises and said warrants subsequently vested in Mrs. Polack; that in 1863, by a judgment recovered in an action brought by Mrs. Chapman against said Godwin and others, judgment for the redemption of said premises was recovered by her grantor, and in virtue of a writ thereunder she was placed in the possession of the premises.

The complaint in this case prays that the plaintiff be adjudged to be the owner of the premises in question; that the deeds from Freniere to Chapman, and from the latter to Chapman, and also the deed from the United States to Freniere be adjudged void, and that Chapman, Gurnee and Freniere be adjudged to be the defendants, and that plaintiff have judgment for possession of said premises and the rents thereof.

The evidence shows that for more than six years thereafter, to the latter part of December, 1869, the plaintiff, by her tenants, had the possession and control, and was in the occupation of the premises in question, including the Hotel and Geyser Springs, and that during this time she expended several thousand dollars in improvements.

thereon; that in September, 1862, Mrs. Polack attended to have a re-survey of the premises in question made, the location of the warrants thereon, so as to adjust them to conformity with the surveys adopted by the United States.

On the day following the filing of the township map at the local land office, the State Locating Agent, on behalf of Mrs. Polack, applied for the location of said school land upon the north half of section thirteen and north half of section fourteen of said township, which application was received by the register of said land office, who issued a certificate certifying that at the date of such filing, to wit, the 15th, 1868, there was no pre-emption, homestead, or rights claimed upon or attached to said lands. The books of the United States Land Office show entries subsequent to that date and up to the month of July, 1868, (which entries, down to the 18th, 1868, I think, were three in number,) were subsequently erased, and the application of Daniel Freniere of the date of January 14th, 1868; and after such erasure the names and applications were again re-inserted. In explanation of this, it was claimed that the application scrip was in fact made on said last mentioned date, but was mislaid and not discovered until July. Upon such application was endorsed the following words: "Power to locate warrant No. 7, S. F. Land Office," which words the evidence tends to mean that the supposed power of attorney of Freniere was a man for the location in question was to be found with a piece of scrip issued to the same party, which piece of scrip was No. 444, Letter B, for forty acres, and which had been previously located in the same land office.

The power of attorney annexed to "B" No. 444, was said to be a special power only authorizing the location of that particular scrip; and hence was insufficient to support the location of the scrip E, which was for 160 acres. Upon the erasure of said scrip, a contest arose as between the state location and the private location, and this contest was pending and undetermined when a patent issued to the Indian Freniere for the land in question.

It appears that after the township map had been restored, the contest was renewed, and a decision of the Register and Surveyor was rendered in favor of the plaintiff and the state location.

This finding was reported to the Commissioner of the General Land Office, who subsequently approved thereof.

Under the Act of Congress of July 23d, 1866, to quiet titles in California, it was in substance provided that where the State had made selections of land in part satisfaction of the 500,000 acre grant, and had disposed of such lands in good faith under her laws, the lands thus selected and disposed of should be and were by said Act confirmed to the State, provided that such selection should be thus confirmed for lands upon which no actual pre-emption right had been theretofore acquired.

ons upon unsurveyed lands, when marked off, were to force and effect of pre-emption rights; and if the lands location and those of the United States survey disagreed, action was to be changed in such manner as to include al subdivisions "which nearest conformed thereto," I have stated in the present case, were the north half as 13 and 14.

the Act of July the holder of the State title was allowed ys wherein to present and prove up his claim. Upon ge of this Act, as heretofore stated, the plaintiff caused a of the land in question to be made by the State locat-, thus basing her claim, not only upon said Act of also upon the Act of 1841.

st question involved in this case which I shall consider he validity of the Freniere Sioux scrip location.

he purposes of this action the patent issued by the ates to Daniel Freniere may be entirely discarded, be- on the trial it appeared by the judgment roll in that erred in evidence that such patent had been adjudged l and void by the United States Circuit Court, and this a finality. Therefore, whatever rights the defendant a might have derived under such patent, no longer the consideration of this case.

however, the patent to Freniere may be void, it is evi- whatever rights, if any were acquired by Chapman by any prior valid location upon the land in question, would in good, notwithstanding the setting aside of the patent. comes necessary, therefore, to consider the question of ty of the scrip location. In the first place it appears scrip was not locatable upon any occupied lands outside ate of Minnesota, and even then such location must n made on behalf of the occupant. It furthermore ap- t at the time of such location the defendant Gurnee, d on behalf of Chapman, as well as Chapman knew of on of the school land warrants in question, of the s prior actual and exclusive possession of the premises on, of the fact that she had made improvements thereon, at that time in the occupancy thereof by her tenants.

et of Congress under which this location was made did ouse, permit such location to be made on lands occupied er. The location could only be made upon lands sub- e-emption, and, as has been frequently determined, t of pre-emption could only be exercised upon unsettled

the Act of Congress provided that such scrip could ocated by the reservee in person, or by his duly author- at, and that such power of attorney, where it existed, presented with and accompany the scrip. This regula- very specifically and precisely laid down in the instruc-

tions of the Commissioner of the General Land Office upon the argument of this case; and the power of the court to make the rule or give the instruction in question is in my opinion, beyond the possibility of a doubt.

Now, the location papers of the scrip in question were made by this power of attorney, to another piece of scrip—viz. Scrip A. The proof shows that no such power accompanied Scrip A. piece of scrip. Upon the trial, however, a certain instrument was offered in evidence which was claimed by the plaintiff to have been the power of attorney in question, and was alleged, was found with 444 A, and that this power, patent had been issued for the land in contest, was referred to the Commissioner to certain agents of Chapman in Washington. In Chapman's deposition he testified that in cases of this character it was his custom to take one general power of attorney for all the scrip, and one separate power of attorney for each of the five pieces thereof, so that he could use them in the land offices in different States.

The power of attorney in question does not appear to be either a general power of attorney for the location of scrip, nor a separate power of attorney; and its discovery upon the trial of this case, some ten years after the commission of this action, was strenuously claimed by the counsel for the plaintiff to be an evidence of fraud. I do not deem it necessary to terminate the latter claim. Assuming the power of attorney to be genuine, and its discovery made in good faith, I think it cannot benefit the defendants' case. It does not appear to have been presented with the scrip in question; and under the instructions of the Commissioner hereinbefore referred to, it was positively required that in all cases of an attempted location, the power of attorney, if such location is made thereon, must be presented with the scrip and the application for the location of such location. It is conceded that the power of attorney in question was not with Scrip B, and there was, therefore, no evidence existing at that time to support Chapman's claim to make such location as the attorney of the Indian.

In the next place, as to the time when such scrip location was actually made, there is considerable doubt. While evidence has been offered tending to show that said application was made, mislaid and not discovered until July, 1868, yet there are circumstances about the case which would seem to justify the conclusion that said location was not in fact made until the latter time. However, as it may, for the reasons hereinbefore stated, that such scrip location was, in my opinion, an absolute nullity; as in the case of *The United States vs. Chapman*, cited in the opinion of the court, where, Judge Sawyer held that such location was absolutely void, and that at the time of the State selection thereon, January 1868, there being no other pre-emption or valid claim, such selection was good as a selection on surveyed lands.

nit Court having adjudged the patent a nullity, thereby connection on the part of defendant with the para- ce of title—namely, the United States. And the loca- tion being in my opinion also a nullity, it is evident defendant has established no title to or right in the question. He stands in this respect in the attitude of a trespasser, and in this view it would be probably, as the Court held in *Fletcher vs. Mower*, 6 Law Journal necessary to determine whether or not the plaintiffs have title from the paramount source, because it is apparant defendant has not.

In the trial the defendant offered in evidence a judgment of the Nineteenth District Court in an action wherein the Chapman was plaintiff and the plaintiffs herein were defendants, in which judgment the title of Chapman to the land in controversy was established and quieted as against the plaintiffs herein. This decision was, in my opinion, upon the fact that at the time of the trial of that action Chapman was the holder of the patent of the United States of course upon its face vested or established *prima facie* in him. Since that action, however, by the decree of the States Circuit Court, such patent has been adjudged null and void, and in this case the defendant Chapman occupies an entirely different position from that which he held in the Nineteenth District Court suit. There he had a status, connected with the paramount source of title—namely, the United States. Here he has shown no status, and is not in any way connected with such paramount source of title.

The plaintiff claims: 1st—That the unsurveyed selections made by him and were valid; but that if not so valid, the location of the land made was a valid location under the 8th section of the Act of Congress of September 4th, 1841. The Act of Congress of 1841 operated, in my opinion, as a grant *in presenti* of the land thereafter selected in the manner that the State should direct.

That such grant was in its nature a floating grant; the selection was once made pursuant to such Acts, as the Court of this State held in *Bludworth vs. Lake*, 33 Cal. 261, "the general gift of quantity becomes a particular gift of specific lands located, vesting in the State a perfect title to the same, and that title passes by virtue of

the location being out of the way, and no pre-emption or other valid claim being on file in the State at the time of the State application, the legal title was thus selected vested absolutely in the State of California at the time of filing said surveyed selection.

vs. Mandell, 38 California, page 44, the Supreme

"The only question yet undetermined relates to which a locator under the State upon unsurveyed land make to enable him to recover as against an intruder in possession. He must undoubtedly bring himself within the conditions of the Act of Congress in question. He must show that he is a purchaser in good faith under the State laws. In fact, however, his certificate of purchase is *prima facie* valid for it has been so declared by the statute of the State. It is that the State has selected the land and sold it to a purchaser and that he has made a payment thereon—that, as a purchaser under the State, he has acquired an inchoate title, one which the State is bound to perfect under her laws, thus satisfying, so far as the conditions of the first section of the Act of Congress. It falls within any of the exceptions there stated, the defendant must prove it."

The criticisms upon the unsurveyed locations of the defendant and objections presented thereto are, in my opinion, unavailing, because it was the manifest purpose and object of the Act of Congress of July, 1866; to cure just such errors and irregularities as are herein complained of. In my opinion, the land in this case was undoubtedly selected and purchased in accordance with the Act from the State, whatever errors may have attended the selection, and that the Act of Congress is a remedial statute and should be, in the language of Mr. Baxter, Acting Commissioner of the General Land Office, "liberally construed for the purpose for which it was enacted—namely, that of quieting land in California."

In Copp's Land Laws, page 457, the Secretary of the Interior speaking of said Act, says: "It is conceded by all that the Act confirms all selections of public lands made under an official grant where the lands thus selected have been lawfully disposed of under State laws to *bona fide* purchasers, whether the selections were regular or irregular, authorized or unauthorized by law."

Furthermore, I think that the defendant is conclusively estopped from questioning the regularity of the State location by reason of the result of the contest had by him in the land office.

It is claimed herein, however, that only a portion of the property known as the Geyser property is within the limit of the northeast quarter of section thirteen, and consideration was offered upon this subject. Upon the official maps of the Martin and Chapman maps of surveys, the hotel building of which was the principal subject of controversy, is delineated as being upon said northeast quarter of section thirteen, and for nearly ten years past both of the parties to the action have acted upon the assumption that such was the case.

Without elaborating upon this subject, I will simply state that for the reasons mentioned in the plaintiffs' brief there can be no doubt that this objection, even if well taken, is too late.

ed States Supreme Court decided, in the case of *Hawes et al.* (2 Black, 554), that a party who resides upon a tract of land within a quarter section limits have been fixed by the Government, and pays receives his patent certificate therefor, and by a survey it is found that his house is not within the tract he has paid, that the Commissioner of the General cannot for this reason set aside the sale.

ore, I am satisfied, notwithstanding the testimony of Chapman and the survey known as the Cox survey, the property so-called is in fact upon the northeast section thirteen, and hence within the limits of the controversy.

ed in this case that because the plaintiff was in possession of the premises when this suit was commenced, the circumstance that she was thereafter evicted does not authorize her to bring an action that was formerly simply an action in equity to quiet title, but an action at law to recover possession of the premises.

of the Code of Civil Procedure provides that in an action to quiet title, the plaintiff may recover possession; and by analogy to this provision, I think in this case the plaintiff is entitled to a judgment for possession of said premises.

vs. Mower (reported in 6th Pacific Coast Law Journal) the Supreme Court speak of a complaint to quiet title containing all the material allegations of the complaint in and treat it as such. In that case, as in this, the plaintiff averred the ownership of the plaintiff, the wrongful possession of the defendants, and pray among other things that the plaintiffs recover the possession of the premises. The court here say that the plaintiffs are entitled to such relief as they have proved themselves entitled to, and not to the mere form of the pleading. It is a well established doctrine of equity jurisprudence that when equity jurisdiction of an action for one purpose, it may hold it

is apparent why in this case the plaintiff, having title to these premises and right to the possession thereof, should be sent out of Court and compelled to institute a new action, to simply enforce a right which in this action is already established to exist.

ore, if plaintiff were now required to commence an action against these defendants, it is probable that the Statute of Limitations could be successfully pleaded. Under the present pleadings there is but one form of action. The pleading should state whereon the party bases his right to recover; and the complaint states what was formerly known as a writ of right, or an equitable cause of action, or both, is of no consequence. He is entitled to any relief within

the issues or consistent with the case made out by the plaintiff. As ancillary to equitable relief thus given, profits have been awarded by Courts of equity, as the Court have held in the case of *Heinlen vs. Martin*, 53

While, therefore, I cannot grant all the relief which the plaintiff asks, namely, to declare the patent void, because it has already been done by the decree of the Circuit Court of the United States, I have power, in my opinion, to award the plaintiff to be the owner of the premises in controversy, and order that the plaintiff be restored to such possession, and award her such damages for the use and occupation of the premises as the circumstances appear proper. In this case, what the value of the use and occupation of the premises in question is, is a matter of great difficulty to determine; several witnesses have testified upon this subject, and their estimate largely varied. I thought the premises were worth \$1,500 a year, others \$5,000. I consider that, under all the circumstances, the defendant is entitled to recover the value of the use and occupation of the premises for a period of five years only, that \$5,000 would be but a fair compensation for the use and occupation of the premises by the defendant.

To summarize the views hereinbefore presented it is as follows:

First. That the patent under which the defendant claimed the premises in question has been canceled and is void.

Second. That the scrip location attempted to be made by the defendant of the premises in question was null and void, thus leaving the defendant in the attitude of a mere trespasser.

Third. That the State location of January 15, 1882, is good and valid as a location upon surveyed lands.

Fourth. That the plaintiff, by virtue of the State purchase, has a right to maintain ejectment.

Fifth. That as between parties to this action, the plaintiff having acquired the prior possession thereof, as a claim of point of right to that of the defendant, and that upon the plaintiff alone, to wit, upon her prior possession, the plaintiff is entitled to recover herein.

Sixth. That, being entitled to recover possession of the premises, she is entitled to the reasonable value of the use and occupation of such premises for the period of five years.

Seventh. That the value of such use and occupation is the sum of five thousand dollars (\$5,000).

It will, therefore, be ordered that a decree be entered in favor of plaintiff adjudging plaintiff to be the owner of the premises in question; that she is entitled to the possession of the premises, and that a writ of restitution issue herein restoring her to such possession, and that plaintiff have judgment against the defendants herein for the sum of \$5,000, the value of the use and occupation, rents and profits of said premises, and is accordingly ordered.

Pacific Coast Law Journal.

MAY 14, 1881.

No. 12.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed April 19, 1881.]

No. 7587.

VON ROUNN ET AL., PETITIONERS,

VS.

SUPERIOR COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO, RESPONDENT.

INSOLVENCY—RECEIVER—ASSIGNEE. The Insolvency Court has power to order attached property delivered to a receiver. Proceedings in attachment are not affected by insolvency proceedings until appointment of an assignee.

B. Wilkins, for petitioners.

W. Naphtaly, Friedenreich & Ackerman, for respondent.

MR. JUSTICE, C. J., delivered the opinion of the Court:

The plaintiff filed in this Court his petition for a writ of habeas corpus, and the return to the writ shows the following facts: On the fourth day of January, 1881, the plaintiffs commenced an action in the Justices' Court of the City and County of San Francisco against one Schillingman for a money demand, and secured an attachment in such action against the property of the defendant therein. The writ was placed in the hands of the Sheriff of said city and county, and on that day the Sheriff, by virtue of such writ, levied upon and took possession of certain personal property belonging to the defendant. On the eighth day of January, 1881, Schillingman filed a petition under the "Act for the relief of insolvent debtors for the protection of creditors, and for the punishment of fraudulent debtors," approved April 16, 1880 (see Statutes of this State, that year, 82); and thereupon the Judge of the Superior Court made an order directing the Sheriff of the City and County of San Francisco to take possession of all the property of the insolvent debtor, except such as was exempt

from execution, and keep the same until the appointment of an assignee of the insolvent debtor; that thereupon the Judge of the Superior Court appointed one Julius H. Smith receiver of the estate, and directed the Sheriff to deliver the property belonging to the insolvent, and including the property held by said Sheriff under the writ of attachment, to the receiver; and under said order the receiver was to be removed from the possession of the Sheriff the property attached, and is about to sell and dispose of the same at public auction, under and by virtue of an order of the Court made in the insolvency proceeding.

It is claimed on behalf of the petitioner that the Court exceeded its powers and jurisdiction when it ordered the Sheriff to deliver the property attached to the receiver. It is very clear that the property was properly in the possession of the Sheriff under the writ of attachment, and that the lien created by the levy of the attachment could only be destroyed by virtue of some provision of law. It was not within the power or jurisdiction of the Court simply by its order to do so in the absence of a provision of the statute authorizing it. It is an order, to destroy the attachment lien. We have called our attention to any provision of law which might justify or sustain the order complained of in this case. Section 17 of the insolvent law, referred to above, provides that "as soon as an assignee is appointed and qualified, the clerk of the Court shall, by an instrument under his hand and seal of the Court, assign and convey to the assignee all of the estate, etc.; and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title in such property and estate, both real and personal, in the assignee, although the same is then attached on mortgage, or in process as the property of the debtor, and shall discharge the attachment made within one month next preceding the commencement of the insolvency proceedings."

In the absence of such a provision in the insolvent law, the proceedings in attachment would not be affected by the appointment of an assignee under the insolvent law; and it is very clear from the foregoing section that they are not affected by the appointment of an assignee. In this case no assignee has been appointed, but a receiver was appointed to take possession of the property of the insolvent debtor until the appointment of an assignee. The order directing the Sheriff to deliver the property to the receiver shows that the receiver was to take possession of the same simply until the appointment of an assignee.

of the opinion that the Superior Court had no power under the law to make such an order, and that the order was, therefore, in excess of its jurisdiction.

The order complained of is set aside and annulled.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 6573.

IN THE MATTER OF THE ESTATE OF ADA
WARDELL.

WILL—PRETERMITTENT CHILD—STATUTORY RIGHT OF SUCH—OMISSION TO PROVIDE FOR. A child born out of wedlock and not legitimated is entitled to inherit from its mother. If a will does not disclose an intentional omission of a pretermittent child, it is entitled to share in the estate of the mother as if the latter had died intestate. The word "child" includes all children upon whom has been conferred the capacity of inheritance.

Appeal from Probate Court, San Francisco.

Van Dyke & Powell and Williams, for appellant.

M. B. Blake, for respondent.

MCKEE, J., delivered the opinion of the Court:

Ada Wardell, a resident of the City and County of San Francisco, died February 25, 1876, leaving surviving her husband, two sons and a daughter. Before her death she had made her last will and testament, whereby she disposed of all her real and personal estate to her husband for life, and the remainder to her two sons. No provision was made in the will for the daughter. Her name was not mentioned in it, and it does not appear by anything in the will itself that the omission was intentional. The daughter was born out of lawful wedlock; she had never been legitimated by the subsequent intermarriage of her parents, or by acknowledgment or adoption of her father. Having been omitted from the will, she resisted the disposition of the property made by it, claiming that, as pretermitted heir of her mother, she was entitled to a distributive share in the estate. The Probate Court recognized the validity of the claim, and, in the final distribution of the estate, adjudged her to be entitled to the same distributive share in the estate of her deceased mother as though the mother had died intestate.

The sons appealed from this decision, and claim daughter of their deceased mother, being an illegitimate child, is not entitled to succeed as an omitted child any portion of her estate. But by Section 1306 of the Civil Code it is provided that "when any testator provides in his will for any of his children, or for the issue of any deceased child, unless it appears that such bequest was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate." In other words, the child succeeds to the same portion of the testator's real and personal property as he would have succeeded to if the testator had died intestate (Section 1306, C. C.) He takes by succession like a child born after the making of the will.

It is contended, however, that the word "child" as used in this section, includes only legitimate children, because it is a rule of construction that whenever statutes use a term without defining it, which is well established in the English law, they must be supposed to use it in the same sense in which it is understood in the English law; and as the Legislature has made no attempt to define, limit or modify the term, or to change in the least its common law meaning, therefore the term must mean only those born in lawful wedlock.

It is well settled that at common law the word "child" means those born in lawful wedlock; and such, in fact, has been its legal meaning in every known system of law. Only those born in lawful wedlock were considered as legitimate whose blood was traceable to the legal marriage of a common pair. A person born in lawful wedlock was not regarded as a member of a family group known in law as the family, and consequently was not entitled to the privileges of members of the family, nor to any rights of inheritance or succession. Yet even if born in lawful wedlock or not, was recognized as a member of the community; and his relations to the community and to each member of it, and in respect of the rights appertaining to it, were matters which were regulated by the law. Indeed, the object of all law is to ascertain the status of individuals in the social system, and to define the rights and duties of which each is the centre.

In relation to children, the common law was a rule of succession to an estate. No one could succeed to an estate of land who was not born in lawful wedlock. Such was the rigorous rule of that law until the reign of Henry III., when the principle of descent was changed in relation to bastards whose parents afterwards intermarried. The

the condition of such children under the common law affected, as Blackstone says, "by the transcendent power of an Act of Parliament." And by the same agency of persons who had no rights of inheritance or succession under the common law has been, under modern law, greatly changed; so that now persons who as bastards had no rights of inheritance are, under the law in most of the States of the Union, capable of inheriting and transmitting inheritance. The legal meaning of the word "legitimate" has, therefore, been greatly enlarged from what it was at common law.

It was now to restrict the word to its common law meaning, to include all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth. But, by statute law, the offspring of marriages null and void (Sec. 84, C. C.), children born out of lawful wedlock whose parents subsequently intermarried (Sec. 215, *Id.*), and children by acknowledgment or adoption of their father (Sec. 227, 228 and 230, *Id.*), are all legitimate. These, incapacitated at common law from succeeding to any estate of their father, are regarded for all purposes as legitimate from the time of their birth. Between them and the children of the same parents the law has established the same relations, and either is as capable as the other of exercising inheritable rights. Hence the term "legitimate," as used in Section 1307 of the law of succession, is not to status, not to origin; to the capacity to inherit, and the legality of the relations which may have existed between those of whom they may have been begotten. The law, therefore, a statutory and not a common law, and its meaning includes all children upon whom inheritance is conferred by law the capacity of inheritance.

The State has regulated the inheritable capacity of all children illegitimate by birth. Those who have not been legitimated by the will of their father, in any of the modes provided by law, have been rendered capable of inheriting from their mother. By Section 1387, C. C., it is declared that "every illegitimate child is in all cases an heir of his mother, and inherits her estate, in whole or in part, as the father would, in the same manner as if he had been born in lawful wedlock." Speaking of such a law passed by the State of Maryland, Mr. Chief Justice Taney has said: "It has never been supposed by the Legislature that, as in England, there should have been no doubt of the relation which the

mother bears towards her illegitimate children, the of policy, which must always preclude such child claiming the inheritance of any one upon the ground was their father, do not apply to the property of the. To this extent, therefore, the right to inherit is given by statute; and it would appear to have been given upon the principle that it is unjust to punish the offspring for the crime of the parents."

The respondent was, therefore, though illegitimate by birth, endowed by the statute with inheritable blood, and possessed the same heritable rights as heir of her mother if born in lawful wedlock. (*Rodgers vs. Weller*, 5 H. & N. 368; *Garland vs. Harrison*, 8 Leigh, 368; *Bennett vs. Gratt*, 588.) As an heir of her mother she differed in law from the other children, so far as the rights of inheritance which had been conferred upon her by law. To the full extent of those rights she was entitled to all the privileges and immunities of heirship. If her mother died intestate, her right to a distributive share of the estate would have been unquestionable. Dying testate, the legal rights between mother and daughter was not impaired or destroyed. The latter was still a legitimate heir, as much so as the children legitimate by birth; for the law made her an heir to the same extent "as if she had been born in lawful wedlock."

It is not to be supposed that the law which admitted her to her person the rights and duties of inheritance, and gave her with the capacity to exercise them, meant to leave her a bastard, under the disabilities of the common law. The mother unintentionally omitted to make provision for her will. When placed by law in the state and condition of a legitimate heir, and invested with the character and capacity of an heir, all the rights, privileges, and legal consequences in that relation were tacitly conferred upon her. (*Swan vs. Swanson*, 2 Swan. 446.) And in the presence of the mother, in which her name was omitted, she was clothed in law with the same rights to inherit as any of the legitimate children would have stood had he been named. The omission did not affect her legal rights, and was expressed on the face of the will to have been intentional. But no such intention appears in the will. The omission was, therefore, unintentional. (*Estate of Utz*, 35 Cal. 336; *Estate of Utz*, 43 Id. 200; *Bush vs. Lindsay*, 336.) And, as pretermitted heir of her mother, the respondent was entitled to a distributive share of the estate. Judgment affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed April 22, 1881.]

No. 7581.

BRODRIBB, RESPONDENT,

vs.

TIBBETTS, APPELLANT.

—PREMATURE ACTION—JURISDICTION—AMOUNT—INTEREST. A
 age given to secure the payment of a note and interest, the latter
 payable monthly, which contains no stipulation for foreclosure in
 t of payment of interest, cannot be foreclosed prior to maturity of
 te. A complaint, showing upon its face that less than the jurisdic-
 tional sum is claimed, is subject to demurrer, on the ground that the
 has no jurisdiction of the subject matter of the action.

l from the Superior Court, San Bernardino County.

Waters, for respondent.

Tibbetts, for appellant.

COURT:

demurrer to the complaint ought to have been sus-

mortgage sued upon contains the following stipula-

* * *

security for the payment to said mortgagee of the sum
 y-one hundred dollars in the gold coin of the United
 America, on the 16th day of September, A. D. 1881,
 rest thereon at the rate of ten per cent. per annum,
 g to the terms and conditions of a certain promiss-
 e of even date of this mortgage, in the words and
 following, to wit:

0. SAN BERNARDINO, Cal., Sept. 16, 1879.
 years after date, without grace, I promise to pay to
 Brodribb, guardian of W. H. Brodribb, or order,
 of two thousand one hundred dollars, payable only
 in coin of the United States, for value received, with
 hereon in like gold coin, at the rate of ten per cent.
 m from date, payable monthly, until paid."
 terms of the mortgage the lien was to be foreclosed
 on the principal sum named in the promissory note
 due. The parties might have agreed that the mort-
 gage should be foreclosable to the extent of the interest due,
 any installment of interest should become due.
 have not so agreed in terms, or by implication.
 no covenant that in case of default in the payment

of interest the principal shall become due, nor any action which can be construed to be a distinct dedication of lands as security for the payment of interest *separate* from the principal, or as authorizing a sale of them to pay prior to the maturity of the note. The mortgage was made as security for the payment of the principal *and* (with) interest thereon," etc. The language employed by them clearly expresses their intention that the contract should be such as that the remedy by the foreclosure would be available until the principal sum should become due.

It may be suggested that the facts alleged in the complaint among which are the making of the note, and that of *seventy* dollars interest is due upon it, would entitle to judgment at law for seventy dollars, and therefore the demurrer was properly overruled. In response—without terminating but that a demurrer to a complaint in equity properly be sustained because the facts alleged show that the plaintiff has a complete remedy at law—it is enough to say that the complaint in the case before us shows on its face that the Court below had no jurisdiction of the matter, to wit, an alleged indebtedness of seventy dollars.

Judgment reversed and cause remanded, with directions to the Court below to sustain the demurrer to the complaint.

DEPARTMENT No. 2.

[Filed April 19, 1881.]

No. 10,603.

THE PEOPLE, RESPONDENT,
vs.
NICHOLS, APPELLANT.

TECHNICAL ERRORS—OBJECTION MUST BE SPECIFIC—DEPENDANT'S RIGHT OF TRIAL—DUTY OF TRIAL COURTS—INSTRUCTION. Recording a statement before it is read to a jury is an irregularity which does not affect the substantial right of a defendant. The Supreme Court is bound to reverse judgment without regard to technical errors not affecting the substantial rights of the parties. An objection on the ground that a statement should be read before it is recorded is not a distinct objection to the substantial right of the defendant is liable to be affected. *Cronin*, 34 Cal. 191, affirmed as to the doctrine of instructions affecting the credibility of defendant as a witness. Trial Courts should follow the statute book, and follow its provisions.

Appeal from Superior Court, San Joaquin County.

Budd and Terry, for appellant.

Attorney-General Hart, for respondent.

ON, J., delivered the opinion of the Court: Defendant was, upon information and trial, convicted in the first degree, and sentenced to one year's imprisonment. From the judgment defendant appealed. He asked for a new trial, which was denied, and from the denial of his motion he also appealed.

The case was submitted to the jury, and they retired for deliberation. As appears from the bill of exceptions, they deliberated two hours and a half before agreeing; and having agreed, they were conducted into the Court by the Sheriff, their names were called by the Court, and all present signed the verdict.

The Court asked the jury if they had agreed upon a verdict, and the foreman answered that they had, and handed the paper to the Court. The Court looked at the paper and said it to the Clerk, saying: "Mr. Clerk, record the verdict." The defendant asked that the verdict be read before being recorded. The Court refused the request, and the bill of exceptions further shows that the Clerk copied the verdict from said paper into the minutes of the Court, read it to the jury, and asked the Gentlemen of the jury, "Is this your verdict?" Some of the jurors answered "yes," and none expressed any dissent. The Court then directed the Clerk to poll the jury, and thereupon asked each juror: "Is this your verdict?" and each answered in the affirmative. The jury was discharged.

It is provided in the Penal Code that when the jury have returned their verdict they must be conducted into Court by the Sheriff having them in charge. Their names must then be called, and they must be asked by the Court, or Clerk, whether they agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, deliver the verdict. (Penal Code, Section 1147.) When a verdict is rendered, and before it is recorded, the jury may be asked the request of either party, in which case they must severally answer whether it is their verdict, and if the answers in the negative, the jury must be sent out for deliberation. (Penal Code, Section 1163.) It is argued upon us that the defendant was injured by the course pursued by the Court in this case, in ordering the verdict recorded before it was read or declared. There is no course pursued by the Court a palpable irregularity which would never have occurred if the provisions of the Penal Code had been looked to by the Court. But has the defendant been prejudiced in any substantial right? For

'by the statute this Court is commanded, after hearing the appeal, to give judgment without regard to technical defects, or to exceptions which do not affect the substantial rights of the parties. (Pen. C., Sec. 1258.) And this command is laid upon us by Section 1404 of the Penal Code in these words: "Neither a departure from the mode prescribed by this code in respect to any proceeding, nor an error or mistake therein, renders the judgment invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right of the defendant."

The case of *The People vs. Rodondo*, 44 Cal. 371, occurred under the Criminal Practice Act, containing provisions identical with Section 1404 Pen. C., and the Criminal Practice Act, Sec. 601, in force before the adoption of the code, the jury, having agreed on their verdict, were conducted into Court, and, without their names being called, the Court received the verdict. On appeal, it was claimed that the Court erred in receiving the verdict without first calling the names of the jurors. At that time the Code required, as it does now, that when a jury agree on their verdict, they shall be conducted into Court, and their names must then be called; and if all do not assent, the rest shall be discharged without giving a verdict. (Crim. Prac. Act, Sec. 414; Pen. C., Sec. 1147.)

The Court held that this was undoubtedly an irregularity in thus receiving the verdict, but under the provisions of the section of the Criminal Practice Act above recited, it refused to disturb the verdict, and affirmed the judgment, holding that the irregularity complained of "in no way prejudiced the defendant."

An application of the section (1404 Pen. C.) will be found in *The People vs. Sprague*, 53 Cal. 494, as also in *The People vs. Gilbert*—a decision of this Court in bank, opinion delivered January 4, 1881. In both of these cases the Court held the contrary, reverse, where there was an irregularity, holding that the substantial right of the defendant had been prejudiced.

In the case under consideration the jury was actually polled by the Court, and each juror answered that the verdict was his. It seems to us that the right of polling was fully exercised, and substantially accorded to the defendant.

In this case it is argued that there is a circumstance which makes it differ from the cases just cited—that in the present case the defendant entered an objection and reserved an exception to the ruling. This is so, and the point will be examined hereafter.

On referring to the facts as above stated, taken together with the bill of exceptions, it will be seen that the objection

ndant was to the recording the verdict before it was
The defendant asked that the verdict be read before
recorded. The Court refused the request, and defend-
pted. The exception was not put, on the ground
defendant was deprived of the right of polling the
t was put simply on the order of procedure, no re-
eing made to any substantial right claimed by the
nt, of which he might be deprived by the action of
rt. The counsel for the defendant, in our opinion,
ave put his objections in a form distinctly challeng-
attention of the Court to the fact that the course
would take away from defendant the timely right of
he jury polled; and not having done so at that time,
ot now be heard to maintain that this Court should
attention to it on this appeal. (*Martin vs. Travers*,
243; *Dreux vs. Domac*, 18 *Id.* 89; *Mahoney vs. Van*
21 *Id.* 576; *Leet vs. Wilson*, 24 *Id.* 402.) We think
judgment or order should neither be reversed on
nt.

struction excepted to by defendant (the fourth re-
by the prosecution) is a copy of one given in *The*
s. *Cronin*, 34 Cal. 195-6, which was held not to be
that case. (*Id.* 204.) The opinion in that case dis-
all the points made by defendant's counsel as re-
is instruction. With the judgment there announced
atisfied, and dismiss the point without further re-

point that the verdict is contrary to the evidence is
taken.

ference to the course of procedure adopted in this
the Court below in receiving the verdict, this Court
to say that they are surprised at the irregularity
as permitted to occur in the matter referred to, when
atory provisions on the subject are so plain and un-
us. Frequently criminal cases come to this Court
al, for the reason that the Court below has neglected
ve the plain provisions of the Penal Code in regard
dure.

much valuable time is lost by this Court in consid-
peals which would never come here if the Judge of
rt below, in directing the trial, would open the Code,
before him and observe its requirements; and we
to the Superior Courts, in trying all cases, whether
riminal, to place before them the statute book, look
y to its provisions in regard to procedure, and ob-
em strictly. We know that many Judges do pursue

this course, but it is evident to us that some do not. The Court has frequently admonished the trial Courts to these matters. (See *People vs. Perdue*, 49 Cal. 628, marks of Court in *People vs. Ah Gow*, 53 Id. 628 Bish. Cr. Pr., Sec. 831.) And in our opinion it is well that such admonitions were heeded.

Judgment and order affirmed.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7474.

JONES, RESPONDENT, vs. GARDNER, APPELLANT.

MORTGAGE—DEFICIENCY—JUDGMENT—INTEREST—SALE OF LAND—REFERENCE—EQUITY—JURY TRIAL—PRACTICE. Defendant's deed absolute, intended as a mortgage. The defendant was to have promised plaintiff payment of the money secured by the deed: *dehors* the deed: *Held*, that plaintiff was entitled to a judgment for the deficiency. It is not error to decree the payment of the deficiency in accordance with the contract of the parties. A plea that it would be to his disadvantage to have separate sale of the land gross raises an immaterial issue. A reference may be ordered in an equity suit when either party alleges facts showing an advantage to be necessary. A person dissatisfied with the report of a referee may except thereto. In an equity case a trial by jury is not a matter of right.

Appeal from Superior Court, San Diego County.

Leach and Parker, for respondent.

Brunson & Wells and A. B. Hotchkiss, for appellant.

By the COURT:

1. The Court found, and the pleadings admit, that the deed to plaintiff was intended as a mortgage. It is held that the judgment over against the defendant was erroneous. Section 2928 of the Civil Code provides that a "mortgage does not bind the mortgagor personally unless there is an express covenant therein to that effect. But here the evidence, *dehors* the deed, which was intended as a mortgage, that defendant had promised to pay the sum of \$1,000 before the 28th day of September, 1878. The fact is admitted by the answer, and it is recited in the bond was executed by the plaintiff contemporaneously with the execution of the deed by defendant. The recital was re-

correct by defendant, who accepted a delivery of the land and indeed relies upon it as evidence that the deed was intended as a mortgage. There was no error in entering a personal judgment.

The judgment does not illegally compound the interest. By the terms of the contract between the parties, a sum of \$1,600 "became due" September 28, 1878, and interest was properly provided for legal interest on such sum from that date. (Civil Code, 1917.)

The Court was not bound to ascertain at the trial whether it would be "to the advantage" of defendant to have the lots sold separately. It may be the duty of the Court to make sale of the lots separately, and it would seem to be the right of the mortgagor to direct the order of the sale, but defendant is not called on to plead that it would be a disadvantage to have the lands sold in gross, and a plea creates no material issue.

It is said the Court had no power to make the order of reference. The language of the first subdivision of Section 9 of the Code of Civil Procedure indicates that the power of the Court to refer depends upon the pleadings on either side or the other. The reference is made "when the matter is an issue of fact" requires the examination of a long account. A reference for such purpose may—under our Constitution—be made in any equity suit, when either party alleges facts showing an accounting to be necessary. The allegations with reference to an "open, current and running account," are made in the answer to a bill in equity. Defendant was not entitled as of right to his trial by the Court. Equity had acquired jurisdiction for the purpose of referring the deed to have been intended as a mortgage, and a foreclosure, even if the matter of accounting was not a subject of concurrent equity jurisdiction.

If the order of reference was broader than the Court was authorized to make, the report shows that the referees limited themselves to two questions—the alleged account and the matter of the absence of plaintiff from the State. The first question was material only in case there had been a mutual and running account, and the referees reported that there never had been such. No exception was taken to the report of the referees, or to any particular action of either party. As to the other issues made by the pleadings, the Court heard all the testimony necessary for determining them, and there is no pretense that defendant offered testimony with respect to them. The judgment affirmed.

DEPARTMENT No. 2.

[Filed April 30, 1881.]

No. 6513.

LADD, APPELLANT, vs. SAMUELS, RESPONDENT.

JUDGMENT—FRAUD—ASSIGNMENT—EVIDENCE. Action to enjoin of judgment, on the grounds that it had been entered against the claim upon which it was based, and that it had been obtained by fraud. There was evidence that the judgment had been entered pursuant to a stipulation of the parties. The respondent refused to enjoin the enforcement of the judgment. *Hall*. Declarations of the assignor of a judgment made after the judgment are not admissible against the assignee. If an assignment of action be in writing, the written assignment is the best evidence of what the assignment was.

Appeal from the Third District Court, San Francisco.

Burch & Griffith, for appellant.*Leake and Martin*, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court.

On the 2d day of November, 1874, respondent commenced an action against the appellant in the Court of the Third Judicial District, in and for the County of Alameda, to recover \$854.34, which was alleged to be due upon a promissory note, and \$308.56 for goods, wares and merchandise, and \$25 paid by plaintiff on defendant's order to the plaintiff's mouth, together with interest on these several sums.

The appellant, in her answer to the complaint, admitted the making of the note, but denied the truth of the information and belief that there was more than \$500 due to her by Samuels at the time of making it, and upon the ground of information and belief denied the other alleged indebtedness of Samuels to her. On the 3d of May, 1875, and pending said action, respondent assigned to respondent Hall the claims and demands against Samuels sued upon in said action, with a stipulation that respondent would prosecute said action to final judgment. On the 1st day of October, 1875, upon the stipulation of the parties, in open Court, a judgment was entered in that action in favor of the respondent Samuels, and against the appellant for the sum of \$1,000.

On the 23d of July, 1877, the appellant commenced an action to have the execution which had been issued upon the judgment entered upon said stipulation set aside, and to have said judgment decreed to be satisfied and extinguished, and to have the respondents, and each of them, enjoined from

the collection of it, and for such further and other might be deemed just. The grounds upon which was demanded are substantially as follows:

the claim or account upon which said judgment was had been fully settled and paid prior to the rendition of said judgment, and that the plaintiff did not know, and that no stipulation for judgment was entered into, and that the claim had been settled and paid, nor was it in her power at any previous time thereto to ascertain the fact, and that the evidence of such payment and settlement was not within the knowledge, possession and control of said plaintiff, "who fraudulently concealed, withheld and suppressed the same, at and before the rendition and entry of said judgment." And that plaintiff did not obtain information of said payment and settlement until after it was too late to move for a new trial or apply to the Court for relief. Plaintiff further alleged that the assignment from Samuels to Moore was collusive, and that the latter, at the date of said judgment, "had full knowledge of the fact of the satisfaction of said judgment, and of the equities against said judgment."

Respondent Hall denied all the equities of said complaint, and upon those issues the parties proceeded to trial. Judgment was entered in favor of the defendants. A motion for a new trial was denied, and an appeal taken to this Court was denied, and judgment and order denying a new trial.

Plaintiff relies upon the "insufficiency of the evidence of the decision of the Court," as a ground for the reversal of the judgment and order denying the motion for a new trial, and claims that "the evidence establishes that at the time of the entering of the judgment stipulated between Samuel L. Ladd, attorney for the plaintiff; and A. A. Moore, attorney for the defendant, in the case of *M. Samuels vs. Ladd*, for the sum of \$1,000, the said defendant in this action, plaintiff in this action, had fully paid and settled the indebtedness claimed, and the fact of such payment was known to and within the knowledge of said Samuels, plaintiff in this action, and he fraudulently concealed from the defendant herein such fact of settlement and payment. The evidence clearly establishes that the said A. A. Moore, attorney for the plaintiff, had no authority from the plaintiff to enter into or consent to the judgment entered against her in the case of *Samuels vs. Ladd*, and that said stipulated judgment was without her knowledge, consent or authority, and that the account of payments taken from Samuels' books and by him prove conclusively that she was not

indebted to Samuels at the time of said stipulation and of judgment. The evidence establishes that the assignment made by Samuels to Hall was the assignment of a third action, and that same was made after the commencement of the action."

The appellant and her daughter did testify on the stand that after the entry of the judgment in *Samuels vs. Hall*, Samuels had a conversation with the appellant, in which (Samuels) stated that he did not think that appellant owed him anything, and that he would give her a receipt in full. At the request of the appellant, Samuels gave an account of what appellant had paid him, and appellant's daughter "set out the items of payment as he gave them from his book." The daughter testified that this occurred on the 16th of March, 1877. These payments amount in the aggregate to something over \$900, and purport to have been made on various times—the first on the 6th of January, 1873, and the last on the 5th of March, 1874.

If Samuels ever made any such statement it was nearly two years after the date of his assignment to Hall, and more than one year after Hall testifies that he informed the appellant of said assignment, and was told by her that she was all right, and that she would pay it." There were no circumstances which would justify the Court in discrediting the testimony in regard to what had occurred between the appellant and Samuels at the time when it is claimed he gave her a statement of payments made by her to him, or in concluding that it was simulated. In view of all the evidence, we do not think that we would be warranted in holding that the Court below was bound to believe the statement or any part of it. And if that Court had refused to discredit it, its judgment cannot be reversed on that ground. If, however, the Court had been satisfied that Samuels made those declarations, they were made long after he had assigned the judgment to Hall, and therefore cannot affect him. Samuels was not called by either party.

Moore, who was the attorney of the appellant in the original action, in which judgment was entered upon stipulation of the parties, testified that he entered into that stipulation with the knowledge, consent and authority of the appellant. The latter contradicts this, which raises a conflict of evidence, and this Court never reverses an order denying or granting a new trial where the evidence upon which it is denied or granted is conflicting.

The assignment to Hall purports to transfer to him the entire subject matter of the action referred to in it.

ignment was in writing, and is the best evidence of what is intended to transfer by it.

We are not satisfied that the evidence was insufficient to justify the decision of the Court below, and it follows that judgment and order appealed from must be affirmed. Judgment and order denying a new trial affirmed.

We concur: Myrick, J., Thornton, J.

In the Superior Court,

CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

JOSEPH EMERIC vs. JUAN B. ALVARADO.

RECEIVERS—POWERS OF, UNDER AN ORDER TO COLLECT RENTS. An order made, pending an action, appointing a receiver "to collect and receive the rents, issues, and profits of the lands and premises described in the complaint in this action [from co-tenants] during the pending thereof, with authority to devise and let the said land and premises in suitable and convenient parcels, and collect and receive the rents thereof, and to apply the same, or so much thereof as may be necessary, to the payment of the taxes imposed and now or hereafter to become due thereon, and otherwise so dispose of said rent and profits, and to pay taxes and other proper charges and expenses as the Court may direct, or as may be agreeable to law, and with all the powers and duties of receivers in like cases," confers no power on the receiver to compel persons in possession to take out leases and pay for the use and occupation of the lands, nor to take away the possession of such co-tenants.

Clure, Dwinelle & Plaisance, Rhodes & Barstow, and T. H. All, appeared for the receiver.

S. Brooks, for defendant, opposed the motion.

AYNE, J.:

On the 18th of November, 1878, the late Fifteenth District Court, in which the above entitled action was then pending, made an order appointing L. C. Whittonmeyer receiver, "to collect and receive the rents, issues and profits of the lands and premises described in the complaint in this action, during the pending thereof, with authority to devise and let the said land and premises in suitable and convenient parcels, and collect and receive the rents thereof, and to apply the same, or so much thereof as may be necessary, to the payment of the taxes imposed, and now or hereafter to become due thereon, and otherwise so dispose of said rent and profits, and to pay taxes and other proper charges and expenses as the Court may direct, or as may be agreeable to law, and with all the powers and duties of receivers in like cases."

At the time this order was made, some of the land was occupied, but most of it was held by persons who must at this stage be tenants in common of the rancho, although they deny the relation, and, who had possession of some portions. After the order was made, many of the occupants refused to pay rent to the receiver of the portions occupied by them, or to him at a rate fixed by him for all the co-tenants. Some refused to pay said rent, or give up their possession, either to the receiver or to the persons to whom he, after such refusal, offered their lands. Among these was Mrs. Jacob M. Tewksbury. The present proceeding is to compel her to account for the rents received over to the receiver the rents and profits of the land occupied by her, and claimed by her, from the date of the order, and to place her in possession, and to have her committed to prison for contempt in disobeying the order.

1. It is evident that the receiver derives his powers from the order appointing him, and from no other source, and no other powers than are therein given. It is plain that his powers cannot in this proceeding be in any way changed by a change in, or amendment of, the order. For it is the duty of a large number of other parties to the suit, who have been brought in upon this motion, and who are entitled to serve notice before any change can be made in an order affecting them. The question, therefore, is one of interpretation of the order.

2. The first branch of the motion is as to the authority of the receiver to compel the parties to accept leases and to let the land. As has already been stated, the receiver was appointed to collect and receive the rents, issues, and profits of the land and premises, * * with authority to demise and let the land and premises in suitable and convenient parcels, and to receive the rents thereof."

It will be observed that, aside from the power to collect the sums collected (which is not material to the issue), the only powers given in trust are to devise and let the land, and to collect and receive the rents, issues, and profits thereof. It is clearly nothing in the order requiring persons to take leases from the receiver, if they do not choose to do so, nor would the Court have had the power to make such a requirement. It may be assumed that it could require them to let their possession, and that the receiver could thereupon let the land to such persons as should agree to take them on lease. It is plain that the Court could not force them to enter into leases against their will, and the order does not undertake to do so, nor is there anything in the order requiring them to let their land for their lands without taking leases. To require them to pay rent for future occupation of their lands would not be in effect from requiring them to take leases therefor. It is nothing in the order which can be construed as a requirement that any person shall pay rent. No amount of rent is

one word as to who shall pay. How can it be said that is required to pay rent by an order which does not or directly or indirectly refer to, the persons who are but leaves them entirely unknown, and fixes no rent the unknown persons are to pay?

contended in this connection that no order speaks of and of "issues and profits," and that the two things ent. It may be so; but the words are used in the same on, and the order contains no greater requirements as to than it does in relation to the other.

of think, therefore, that under the order the parties can elled to sign leases and to pay for the use and occupa- the land; and so far as the motion is based upon those it must fail.

is contended, however, on behalf of the receiver, that r authorizes him to take possession of the premises, and co-tenants ought to have surrendered their possession and should be compelled to do so now, and be punished having done so before.

ady stated, all the power which is given to the receiver, is "to collect and receive the rents, issues and profits and described in the complaint in this action, during ency thereof, with authority to demise and let the said premises in suitable and convenient parcels, and collect ve the rents thereof." It is obvious that power to take on of the lands away from the co-tenants is not expressly f such power exists it must be implied, and it is in- y argued that such power is to be implied from the use ord "demise;" that that word "carries with it the power and maintain the lessee in possession;" and cases are ch hold that an action of covenant can be maintained agreement to "devise and let" property if possession een delivered to the lessee. (See *Noakes' case*, 4 Coke *Holder vs. Taylor*, Hobart 12; *Line vs. Stephenson*, 4 C. 678.) But I do not think that the same rules are to ed in the construction of judgments and orders of a justice, which are supposed to be carefully framed by persons, as to to the construction of the agreements of hich, in the majority of instances, are loose and informal. bring myself to turn out the co-tenants of the rancho y such implication. If such power was to be exercised ceiver, it should have been expressly given.

ords, "with all the powers and duties of receivers in s," only give such powers as are incidental to the powers which, as we have seen, do not include those contended s motion. That these general words carry incidental ly seems to be assented to by the able counsel for the as no argument has been founded on them.

ected, however, that the order appointing the receiver

must be taken to convey some powers, and that "it is id that he was appointed for the mere purpose of dem lands in the possession of those parties, who were will the lands might be demised for the purpose of raising a the objects contemplated by the order. No judicial order was requisite for that purpose."

But in the argument of this motion it was stated with worthy candor by Mr. Hittell, of counsel for the receiver, one of the leading attorneys in the partition suit, that at the time the order was made it was supposed that all the co-owners would be willing to accept leases at a uniform and low rate for the advancement of the common welfare; and I can easily see how they might more readily agree upon a person designated by the Court, than to choose one of their own number; and they are at liberty to go outside of the order itself to find a person in the circumstances of the case and the situation of the land. I think the suggestion of Mr. Hittell is the true solution of the difficulty.

The view I have taken of the case renders it unnecessary to determine whether the Court has power to require the co-owners in possession to surrender their possession if a receiver is appointed by the Court. I leave that question undetermined. As stated in the beginning, I would not entertain an appeal so as to enlarge the powers of the receiver, unless all parties interested had notice.

April 6, 1881.

Supreme Court of the United States

OCTOBER TERM, 1880.

No. 149.

MARTHA J. BENNETT, ADMINISTRATRIX OF JOHN BENNETT,
DECEASED, PLAINTIFF IN ERROR,

VS.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

LIABILITY OF OWNER OF PREMISES TO PERSONS LAWFULLY ENTERING PREMISES OCCASIONED BY UNSAFE CONDITION OF SAME. The occupant of land who, by invitation, express or implied, leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, or was negligently suffered to exist, without timely notice to them, or to those who were likely to act upon such invitation.

In error to the Circuit Court of the United States for the District of Kentucky.

Justice HARLAN delivered the opinion of the Court:
writ of error to the Circuit Court of the United States
district of Kentucky.

on was commenced by a petition framed in accordance
Kentucky Code of Practice in civil cases. Its object is
damages for personal injuries alleged to have resulted
gence or want of proper care on the part of the agents,
and employes of a railroad corporation engaged in the
f transporting freight and passengers for hire. The
as twice amended, and to it, as amended, a demurrer
osed, and being sustained, judgment was given for the
After judgment the plaintiff died, and the action was
this Court in the name of his personal representative.
trolling question before us is whether the petition and
petitions make out a cause of action against the com-

the averments in the pleadings, and for the purposes of
as presented, we must assume the existence of the fol-
lows:

near 1876 the deceased was a passenger on the cars of
plant company from Vernon to Danville in the State of
e. At the last named place he left the train for the
of taking the steamer Rapidan, which belonged to the
e and Tennessee River Packet Company, and was en-
the navigation of that river. Its customary place of
or Danville and immediate vicinity, on that side of the
at a wharf-boat, moored at or against a lot, within a
red yards of the railroad station. Between the railroad
and the packet company there was, at the time, an
ent or contract, by the terms of which each party en-
community of interest (in what proportion it is not stated)
eight and passenger traffic at that point. They were
at liberty to sell through tickets, and give through
ading, over their respective lines. Both the wharf and
ere owned by, and were under the exclusive control of,
ad company. The former was used by the company
ublic for storing freight, and as a convenient place for
ng of steamboats navigating the river. The lot had
chased and used by the company in connection with the
at, for the purpose of facilitating its passenger business,
s for the receipt and discharge of freight coming from
to the railroad, or going from the railroad to the river.
use of its wharf-boat and landing, the railroad company
benefit and compensation. To further facilitate their
d passenger business, the railroad company had erected
tained upon such lot, in front of the wharf-boat, a large
d-depot, about 240 feet in length, and twenty feet in
the centre of which was a room or apartment containing
e, which was used for the purpose of hauling freight to

and from the river by means of flats or cars drawn by railroad tracks. These cars were pulled up the bank (of which there were four, two on each side of the entrance left in the floor of the depot. These spaces or hatchways they are called, were about eleven feet in extent, and ran from the river side of the depot nearly to its centre.

The customary, and indeed the only safe, available and convenient route for persons passing from Danville to the steamboat landing, was along a plank-way (on each side of which was low and marshy) put down by the railroad company, 600 yards in length, extending from Danville along a side of the railroad, and terminating at or near the northern end of the depot; thence up a flight of steps to the depot floor across the floor of the depot towards its southern end, and down a flight of steps located between two of the hatchways to the wharf-boat, over a macadamized or gravel way, which the railroad company had constructed for the convenience of persons going upon business to or from the steamboat landing. It was the custom of travelers, passing between the railroad station at Danville and the steamboat landing, to use as a foot-way the plank-way, the depot floor, and the macadamized way leading to the wharf-boat, was not only a necessary one, but was known and permitted by the company. There was no path, or other convenient way around the shed-depot to the wharf.

Such was the situation when the deceased reached the cars of the company. He stopped at a hotel to await the coming, that night, of the steamer Rapidan, whose time of arrival at the landing were known to the railroad company. Some time after midnight the steamer reached the wharf landing, and, by whistle, signaled for landing at the wharf. The deceased started from the hotel for the steamboat, for the purpose of prosecuting his journey, taking with him a lighted lantern. He went upon the plank-way leading to the shed-depot, and, having been informed by the landlord that that was the proper way to take. He had proceeded but a short distance when he extinguished the light, and fearing the boat would in the meantime depart, and being able to see the plank-way, he proceeded to the depot (which was unlighted), and passing up the steps at the northern end, he attempted to cross the floor in the depot towards the steps at the southern end, leading down to the macadamized or gravel way we have described. He was unaware of the existence of the openings or hatch-holes in the depot floor, and of any other obstruction or danger in his path, and, although he took care, he fell through one of the hatch-holes (which had been left uncovered and unguarded for some time before), and fell a distance of at least five feet, upon the cross-ties and rails of the depot. By the fall his left ankle and foot were broken and severely injured, causing severe and permanent injury, attended by sickness and long confinement to his bed. The demurrer conceded

were aware as well of the condition of the hatch-holes
pot floor as that such condition was unsafe and dan-
the traveling public.

right to revive this action in the name of the personal
ative of Bennett seems to be clear under the laws both
ky and Tennessee, by each of which States the defend-
any was incorporated, and in the latter of which,
the injuries for which damages are claimed. (*Ky. Gen.*
Tennessee Code, § 2846.)

facts disclosed by the pleadings, and by the demurrer
to exist, seem to bring this case within the rule—
justice and necessity, and illustrated in many adjudged
the American Courts—that the owner or occupant of
by invitation, express or implied, induces or leads
come upon his premises, for any lawful purpose, is
damages to such persons—they using due care—for
occasioned by the unsafe condition of the land or its
s, if such condition was known to him and not to them,
negligently suffered to exist, without timely notice to
or to those who were likely to act upon such invitation.
Co. vs. Hanning, 15 Wall. 659; *Carleton vs. Fran-*
and Steel Co., 99 Mass. 217; *Sweeny vs. Old Col.*, 10
; *Wharton's Law of Negligence*, § 349 to 352; *Cooley*
304-7, and authorities cited by those authors.) The last
thor says that when one "expressly or by implication
ers to come upon his premises, whether for business
other purpose, it is his duty to be reasonably sure that
inviting them into danger, and to that end he must
ordinary care and prudence to render the premises
safe for the visit."

is also illustrated in many cases in the English Courts,
which it may be well to examine. One, referred to by
in *Railroad vs. Hanning*, is *Corby vs. Hill*, 4 Scott's C.
N. S., 562. That was an action for an injury sustained
intiff while traveling upon a private way leading from
the road to a certain building, and over which parties
occasion to visit such building were likely to pass, and
ustomed to pass, by leave of the owners of the soil. The
negligently obstructed the way by placing thereon
materials without giving notice or warning of the obstruc-
tion or other signal, and by reason thereof the plaintiff's
driven against the obstruction, and injured. One of
was that the defendant had placed the materials on the
the license or consent of the owners of the soil. Upon
ent of the case, counsel for the defendant contended
owners of the soil, and consequently, also, any person
ve or license from them, might, as against any other per-
the way by the like leave and license, place an obstruc-
tion without incurring responsibility for injury resulting

therefrom, unless in the case where an allurements or inducement was held out to such other person to make use of it. Upon the general question, as well as in response to the question put by the learned counsel, Cockburn, C. J., said: "It seems to me that the inducement from which the learned counsel seeks to distinguish the case now before us. The proprietors of the soil held the land out as an allurements whereby the plaintiff was induced to come to the place in question; they held out this road to all persons on every occasion to proceed to the asylum as the means of access thereto." * * Having, so to speak, dedicated the way to the use of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was no fault or tent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to persons to whom they held it out as a way along which they intended safely go. If that be so, a third person could not acquire a right to do so under their license or permission." In the case of *Williams, J.*, said: "I see no reason why the plaintiff should not have a remedy against such a wrong-doer, just as if the obstruction had taken place upon a public road. Good policy and justice require that he should have a remedy, and there is no authority against it." Willes, J., remarked: "The defendant has no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has no right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons coming there may receive injury."

Another case, often cited, is *Chapman vs. Rothwell*, 11 Q. B. 168. The declaration there charged that the defendant was in possession and occupation of a brewery office, and a passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business as a brewer. The passage was the usual and ordinary means of ingress and egress to and from the office, from and to the public street. The defendant negligently permitted a trap-door on the floor of that passage to be and remain open, without being properly guarded and lighted. The plaintiff's wife had been in the brewery office as a customer in the defendant's business, and was walking along the passage on her return to the public street when she fell through the trap-door and was injured. Upon the argument counsel for defendant insisted that the trap-door appeared showing it to be the duty of the defendant to keep the trap-door closed. To this Erle, J., replied, with the assent of Lord Campbell, C. J.: "If you invite a customer to come into your shop, and leave a pitfall open, or a large iron peg in the floor over which the customer is likely to tread, is it not your duty and a breach if accident ensues?" The Court then held that a distinction between the case of a mere visitor, as in *Scott*

H. & N. 247, and a customer, who, as one of the pub-
 vited for the purposes of business carried on by the
 occupier of the premises.

ermaur vs. Dames (L. R., 1 C. P. 288, and L. R., 2 C.
 he Court, referring to the class of persons who visit
 upon business which concerns the occupier, and upon
 tion, express or implied, said that it was a settled law
 itor of that class, "using reasonable care on his part for
 safety, is entitled to expect that the occupier shall, on
 use reasonable care to prevent damage from unusual
 hich he knows or ought to know; and that, where there
 ce of neglect, the question whether such reasonable care
 taken, by notice, lighting, guarding, or otherwise, and
 there was contributory negligence in the sufferer, must
 nined by a jury as a matter of fact."

Mcaster Canal Company vs. Panaby, 11 Ad. & El. 242,
 s the case of a company making a canal for their profit,
 ing it to the public use on payment of tolls, it was held
 xchequer Chamber that the common law, in such a case,
 a duty upon the proprietors, not perhaps to repair the
 absolutely free it from obstructions, but to take reason-
 , so long as they kept it open for the public use of all
 to navigate it, that they may navigate it without danger
 elves or property.

me principle was applied by the Exchequer Chamber in
Trustees of the Liverpool Docks, 3 H. & N. 173. That
 action by the owners of a ship to recover for an injury
 the cargo by reason of the ship, when entering, having
 bank of mud carelessly and negligently left in and about
 nce to the dock. The defendants were not individually
 by the operations of the company of which they were
 but, by statute, were bound, as such trustees, to apply
 received in maintaining the docks, and in paying the
 tracted in making them. The Court, speaking by Col-
 ., held, that whether the defendants received the tolls
 neficiary or a fiduciary purpose, the knowledge, upon
 t, that the entrance to the dock was dangerous, imposed
 m the duty of closing the dock against the public, as
 hey became aware of its unsafe condition; that they had
 with a knowledge of its condition, to keep it open and
 the vessel in question into the peril which they knew it
 ounter, by continuing to hold out to the public that any
 the payment of the tolls to them, might enter and navi-
 dock.

gment was affirmed upon full consideration in the
 Lords, 11 H. L. Cases, 686. In the opinion there de-
 y Mr. Justice Blackburn, on behalf of all the Judges who
 he argument, among whom were Lords Cranworth,
 ale and Westbury, it was said: "For a body corporate

never can either take care or neglect to take care, except its servants; and (assuming that it was the duty of the to take reasonable care that the dock was in fit state) clear that if they, by their servants, had the means of that the dock was in an unfit state, and were ne ignorant of its state, they did neglect this duty, and did reasonable care that it was fit."

We forbear further citation of authorities. It is clear rule which obtains in the English Courts is in harmony generally recognized in the Courts of this country.

That upon the case as made by the pleadings the company is liable in damages none of us entertain an As the deceased did not purchase from the railroad co through ticket, but only a ticket, over its line, from V Danville Station, it may be argued that the relation of ca passenger, which existed between him and the comp minated when the latter left the train at Danville Sta consequently, that there was no breach of the compar tract of transportation. But there was, nevertheless, of legal duty or obligation for which, as property ow railroad company is responsible.

It cannot be pretended that Bennett, at the time he jured, was, in any sense, a trespasser upon the premis company. Nor is this case like many cited in the books passive acquiescence by the owner in the use of his pre others. Nor is it a case of mere license or permission owner, without circumstances showing an invitation exte an inducement, or in the language of some of the c allurements, held out to him as one of the general publ sometimes difficult to determine whether the circumstan a case of *invitation*, in the technical sense of that word in a large number of adjudged cases, or only a case license. "The principle," says Mr. Campbell, in his Tr Negligence, "appears to be that invitation is inferre there is a common interest or mutual advantage, while is inferred where the object is the mere pleasure or h the person using it.

As each case must largely depend upon its special cir ces, we shall not attempt to lay down a general rule subject. It is quite sufficient to say that no difficulty of ination exists in the case before us. This is the case of a going upon a way which had been constructed, and w tained by a railroad company, in part for its own be profit, to be used by all, without distinction, who des purposes of business, to pass to and from the company boat, moored at an established landing upon a public r river. The deceased, when injured, was using the pre some of the very purposes for which they had been appr and to which they had been, so to speak, dedicated

They were so situated, with reference to the river, and occupied and controlled by the company as not only to their use by the public, but, in a sense, to compel those doing business at the river landing, to abandon such business, and to prosecute to pass over the route through the shed. It was, therefore, the plain duty of the company to take precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who were to use the premises for the purposes for which they were appropriated by the company, and for which, with its consent and permission, it was commonly used by the public. The court is all of opinion that the pleadings, though somewhat general and argumentative, state facts sufficient to require an answer from the defendant. It is a case peculiarly for the consideration of a jury of practical men, who, under proper instructions, can best ascertain to what extent, if at all, under the circumstances actually existing, the railroad company was negligent in the discharge of any duty or obligation imposed by the law. How far, if at all, the deceased was wanting in due care and diligence on the occasion when he was injured.

With regard against misapprehension, it is proper to remark also that the opinion must not be understood as making the plaintiff's right to recover dependent upon proof of every single fact averred in the pleadings, or which has been recited in this opinion. We have considered the case in the light of the facts, as averred, and the demurrer conceded to exist. Upon the trial, after issue has been joined, the Court will have no difficulty, in view of what we have determined, in determining whether the case, as actually presented to the jury, shows a breach of duty or legal obligation upon the part of the railroad company, for which it may be liable in damages.

If the judgment is reversed, and the cause remanded with instructions to overrule the demurrer, and for further proceedings accordingly, it is with this opinion.

Abstract of Recent Decisions.

CIRCUIT COURT—DISTRICT OF OREGON.

OPINION. A suit arises out of a law of the United States in controversy involved in it turns upon the proper construction and application of such law; and, therefore, a suit by a vessel authorized to engage in the coasting trade on the Willamet River, and by riparian owners thereon, to enjoin the erection of a bridge over said river at Portland as being in violation of the Act of Congress under which said vessel was licensed, and the Act of Congress (11 Stat. 383) de-

declaring said river a free and common highway, arises under the laws, whether the plaintiffs are entitled to the relief sought.—*Hatch et al. vs. The Willamet Iron Bridge Company*, 28, 1881.

NAVIGABLE WATERS—CONTROL OF. The power of Congress to regulate commerce (Con., Art. I, Sec. 8) includes, for the purposes of commerce, control of all the navigable waters of the United States which are accessible from a State other than one in which they lie; and for this purpose they are treated as of the nation, and subject to the legislation of Congress, in particular affecting their navigability or use as instrumentalities of Congress.—*Id.*

BRIDGES—NAVIGABLE WATERS. The State has the power to bridge the waters within its limits, but this power is subject to the power of Congress to prevent obstructions to navigation being placed in such waters within the State, and accessible without it; and therefore, in the absence of legislation by Congress to the contrary, a State may dam or otherwise obstruct navigable waters within its limits at pleasure.—*Id.*

CONGRESSIONAL ACTION — CONSTRUCTION OF. The Act of Congress authorizing a vessel to engage in the coasting trade and a State are construed as not manifesting an intention to prevent part of Congress to interfere with the power of the State to construct the navigable waters within its limits, but only to regulate their navigation by such vessel for the purposes of commerce so long as they are navigable.—*Id.*

IDEM. The provision in Section 2 of the Act of February 22, 1859 (11 Stat. 383), admitting Oregon into the Union, declares that "all the navigable waters of said State shall be free common highways, and forever free" to all the citizens of the United States, is paramount to a law of the State authorizing a bridge to be erected across the Willamet River; and, therefore, if a bridge as proposed to be constructed will materially obstruct the free navigation of said river, it is unlawful for the parties constructing it may be enjoined at the suit of the owners injured thereby.—*Id.*

INJUNCTION GRANTED. A preliminary injunction granted to restrain the building of a bridge over the Willamet within only 100 feet on either side of the pivot-pier, under the authority of an Act of the State Legislature authorizing the construction of such bridge, with a good and sufficient draw of not less than 100 feet, upon evidence showing that such a bridge would materially obstruct the navigation of the river, because said Act does not absolutely authorize a bridge with a draw of only 100 feet, and if it did, it was in conflict with the Act of Congress of February 14, 1859 (*supra*), declaring the river a free and common highway, and therefore it is void.—*Id.*

Pacific Coast Law Journal.

I.

MAY 21, 1881.

No. 13.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed April 29, 1881.]

No. 6857.

KELLOGG, APPELLANT,

VS.

PACIFIC BOX COMPANY ET AL., RESPONDENTS.

Y NOTE—PROTEST—NOTICE—CERTIFICATE OF NOTARY—INDORSER
EVIDENCE. A certificate of a notary attached to the protest of a
missory note that the parties to the note had been duly notified of
protest is sufficient. A certificate of a notary stating that he
ified a person of the protest of a note by a letter to him, written,
ressed and dated on the day of the protest, and served it on him
delivering the letter at his place of business to a person of dis-
ion having charge thereof is sufficient. A delivery of a notice by
otary at the place of business of a party to a person of discretion
harge thereof obviates the necessity of sending it by mail. A
y receiving notice of the protest of a note for non-payment is
ciently informed thereby of the note having been dishonored.
s not necessary, in order to fix the liability of an indorser, that the
e should be protested.

l from Twelfth District Court, San Francisco.

bell, Fox & Kellogg, for appellant.

& Hayes, for respondents.

STEIN, J., delivered the opinion of the Court:

he trial of this action, upon a promissory note, in
e makers and indorsers are sued, the plaintiff offered
l in evidence the note, and then in the language of
ement on motion for a new trial, "offered in evidence
of protest in the words and figures following, to wit."
ollowed by what purports to be a copy of a notary's
a copy of the note protested, and a certificate of the
at the parties to the note had been duly notified of
test. The respondents, two of the indorsers of said

note, "objected to the admission of said notice of protest on the ground that the same was incompetent, irrelevant and inadmissible," and then proceeded to specify wherein the protest was incompetent and irrelevant.

Strictly speaking, the offer did not embrace a "notice of protest," and the objection was, doubtless, to the introduction of the notary's certificate that such a notice had been given.

The objection was sustained, plaintiff excepted, and without introducing any evidence, rested. The respondent moved for a nonsuit, which was granted. A motion for a new trial, upon a statement, was denied; and from the judgment and order denying a new trial the plaintiff appealed.

The ruling of the Court upon the objection of the respondent to the introduction of "the notice of protest" is assigned as error, by the appellant. If the certificate "that the parties to the note" had "been notified of the protest thereof" was competent and relevant testimony, the exception to the ruling of the Court was taken.

By Section 795 of the Political Code, "the protest of a notary, under his hand and official seal, of a bill of exchange or promissory note, for non-acceptance or non-payment, stating the presentment for acceptance or payment, the non-acceptance or non-payment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving notice and the reputed place of residence of the party to whom the bill of exchange or promissory note, and of the party to whom the same was given, and the postoffice nearest to the place of residence of the party to whom the same was given, as primary evidence of the facts contained therein." The object of this provision seems to have contemplated a statement of the service of the notice on any or all of the parties to the protested bill or note, in the protest itself. A literal compliance with a requirement that a protest should contain a statement that a notice of it had been served on all of the parties to the protested bill or note might be possible, but was contrary to usage, so far as we are at present advised. It is which we infer that it was the intention of the Legislature that the certificate of a notary that notice of a protest had been given to all the parties to a protested bill or note should be attached to the protest and be admissible in evidence as the same as the protest itself. Such we think to have been the practice at the time of the enactment of the Code referred to, and the Legislature seems to have had that practice in view when enacting the clause above quoted.

It is not necessary, in order to fix the liability of in-

note should be protested for non-payment. A presentation to the maker upon the day of its maturity for payment, refusal by him to pay it, and notice to the indorsers of presentation and refusal, are sufficient.

Notice of dishonor may be given in any form which defines the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored." (C. C., Sec. 3143.) Under that provision, we think that a notice of the protest of a note for non-payment would be a sufficient notice of dishonor. A notice of dishonor may be given "by delivering it to some person of discretion at the place of residence or business of the party, apparently acting for him." (Id. 3144.) The notary testified that, in this case, he notified each of the respondents of the protest of said note by a letter to him written and dated, dated on the day of said protest and served on him by delivering said letter at his place of business to a person of discretion having charge thereof." The certificate states the mode of giving notice of the protest to the respondents, and in that respect is in compliance with Section 3144 of the Political Code. It does not state the place of residence of the party to the note, nor the postoffice nearest to the residence, and because it does not, the respondents contend that it is inadmissible as evidence. It does, however, state that the notice was delivered to a person of discretion having charge thereof, which is certified to have been done and was done and served at San Francisco. The letters certifying notice of the protest of the note were delivered to the respective places of business of the respondents, and in each instance to a person of discretion having charge thereof. As that was done at San Francisco, the respondents' places of business must have been there, and it was not necessary to state that the San Francisco postoffice was nearer than any other postoffice to San Francisco. A notice of the notice at each of respondents' places of business to some person of discretion in charge thereof obviated the necessity of delivering it at or sending it by mail to the respective residences of the respondents, and therefore it was unnecessary to state where said residences were or the postoffice nearest thereto. From which we conclude that the certificate, together with the protest, was competent and admissible as evidence for the plaintiff in the action, and that the objection to its introduction was overruled. The trial of said action.

The court then entered judgment and order denying motion for a new trial and cause remanded for a new trial.

Concur: Morrison, C. J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 10,610.

EX PARTE BERNERT, ON HABEAS CORPUS.

ORDINANCE—JUDGMENT—POLICE COURT, SAN FRANCISCO—POOL NOTICE—HABEAS CORPUS—RETURN—EARNING—LICENSE—The Act of March 30, 1872, conferring upon the Board of of San Francisco power to enact a license ordinance, persons carrying on business without a license shall be punished by a fine of not less than \$100. The Board of Supervisors ordinance providing that persons violating its provisions shall be punished by a fine of not more than \$1,000. The petitioner, convicted, under the ordinance, of keeping a pool table, and pay a fine of twenty dollars, and in default of payment to be imprisoned for ten days. *Held*, that the judgment was absolutely void—the Court has no power, under the Act, to render a judgment in a less sum than \$100, and that the Board of Supervisors could not, in the exercise of its power, fix the penalty in a sum less than \$100: *Held*, further, that the petitioner was entitled to a discharge, notwithstanding the punishment imposed by the ordinance, as the punishment was more favorable than authorized by law. That a Court has jurisdiction to set aside a judgment rendered by a Court of record, on a writ of habeas corpus, where the judgment is manifestly erroneous, and the offense charged and its punishment, is a manifestly erroneous test of the validity of a judgment rendered by a Court of record, notice will not be taken that the game of "pool" necessarily involves gaming for money or value. There is no statute prohibiting the game of pool from being played for value. The ordinance passed under the Act of March 30, 1872, relative to taking out licenses for pool tables, or for those parties to take out licenses who make a business of keeping pool tables for profit. If the return to a writ of habeas corpus shows that the petitioner is held under a void judgment of a Court of record, the Court has jurisdiction to set aside the judgment, and to discharge the petitioner. By virtue of the warrant issued at the time of the commencing the proceedings upon which such void judgment is based, the proceedings of March 23, 1878, does not operate a repeal of provisions of the Act of March 30, 1872, authorizing the Board of Supervisors to fix the sum to be paid by different trades, except to the extent that the ordinance is in conflict with the provisions of the Act.

H. G. Siebert, for petitioner.

D. L. Smoot, *contra*.

MCKINSTRY, J., delivered the opinion of the Court.

The petitioner was convicted in the Police Court of San Francisco (and adjudged to pay a fine of \$20, and, in default of payment thereof, to be imprisoned in the County Jail for the period of ten days) of the offense of violating the ordinance entitled "Order No. 1589," portions of which are as follows:

"Section 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$100, and not more than \$1,000, or by imprisonment for not less than ten days, and not more than thirty days, at the discretion of the Court."

not more than one thousand dollars, or by imprisonment not more than six months, or by both." Section 10, subdivision 43. Each proprietor of a billiard and pool table, not kept exclusively for family use, shall pay a license of six dollars a quarter; and for a saloon, six dollars a quarter; and for each additional billiard table, five dollars per quarter."

The authority of the Board of Supervisors to enact the ordinance is derived, as is claimed, from the third section of the Act of March 30, 1872 (Stats. 1871-2, p. 737), which provided that the Board shall have power, by ordinance, "to license and regulate all such callings, trades and occupations, and all amusements as the public good may require to be licensed or regulated, and as are not prohibited by law."

The first section of the same Act provides that if any person shall be engaged in carrying on, pursuing, etc., within the limits of the city and county, any business, etc., which shall be required to be licensed, without having first obtained the license therefor so required by the laws of this State, "or by the lawful orders of the Board of Supervisors of the city and county," he shall be deemed guilty of a misdemeanor, and, on conviction thereof, "shall be punished by a fine of not less than one hundred dollars, or by imprisonment for a period not exceeding thirty days, in case the fine is not paid."

The first question to be considered is whether Order 1589, which provides that any person who shall violate any of the provisions of the order "shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than six months, or by both," authorized the sentence which was imposed upon the petitioner. The third section of the Act of March 30, 1872, empowered the municipal government to establish a reasonable penalty for a violation of any ordinance it might pass, with the condition and limitation (found in Section 1 of the same Act) that the penalty should in no case be a fine of less than one hundred dollars, or an imprisonment of not exceeding thirty days in case the fine should not be paid. The first section of Order 1589, therefore, if it be read in the light of the Act of 1872, would authorize a fine of twenty dollars, or any imprisonment as an alternative. If, however, the order could be read as authorizing a fine of less than \$100, the order to that effect would be invalid, since, by reason of the first section of the Act of 1872, the Supervisors had no power to provide for punishment by a fine of less than \$100. But this would not affect the rest of the ordinance.

Counsel for petitioner claims that the Act of 1872 repealed by the Act of March 23, 1878 (Stats. 1442). Assuming, without deciding, that the Act of 1878 relates to municipal as well as State licenses, it simply enumerates certain businesses and occupations, and what shall be paid for license by each of those specified. It does not operate a repeal of the provisions of the Act of 1872, which authorizes the Board of Supervisors to determine the sum to be paid by different trades, occupations, businesses, or employments carried on or conducted within the limits of the municipality, except to the extent of the particular businesses, trades, professions, occupations or employments "specified" in the Act. Neither does the Act of 1878 expressly or impliedly repeal the first section of the Act of 1872, which limits the punishment of those found guilty of refusing to take out a license, as required by any law of the Board of Supervisors.

The power of the Police Court of San Francisco to punish one guilty of a violation of the ordinance comes from the first section of the Act of 1872, which provides that any person convicted shall be punished by a fine of not less than \$100, or by imprisonment for a period not exceeding thirty days, in case the fine is not paid, and from the ordinance which fixes the maximum of fine at \$1,000. The ordinance employed is, in effect, a declaration that the Police Court shall have power to fine only in the sum of \$100, or in a sum not exceeding \$1,000, and that the imprisonment shall be inflicted only in case the fine of \$100 or more is not satisfied by payment. It is prohibitive of a sentence to imprisonment of more than \$100. If the judgment as to the fine be invalid, the judgment as to the imprisonment, since the latter is the only alternative.

It is urged that petitioner cannot be heard to object to a judgment which imposes a less penalty than that provided by law, and—if the action of the Court was merely erroneous—it is undoubtedly correct to say that we ought to listen to his complaint. Although, when error is shown, a jury will be presumed. This Court will not, on a writ, reverse a judgment for error, unless the defendant has been prejudiced. (*People vs. Turley*, 50 Cal. 441; *People vs. Ybarra*, 17 Cal. 171.)

Of the cases cited by the District Attorney to show that a defendant cannot have a judgment reversed unless more favorable to himself than is authorized, it is marked that nearly all of them were appeals. There is no doubt of the correctness of the proposition when

court had jurisdiction to render the judgment appealed in *Ooton vs. The State*, 5 Ala. 464, the question of jurisdiction of the lower Court was not considered by the Supreme Court, nor called to its attention. In *Barrada State*, 13 Mo. 94, there was an intimation that the lower Court had jurisdiction, in a proper case, to enter the judgment appealed from. In Logan's case, 5 Grattan, 692, the prisoner had been adjudged to be confined in the penitentiary for two years. The law authorized an imprisonment of more than five years. On suggestion of error on the face of the record, the Court which had tried the prisoner admitted him to be confined three years in addition to the two years. A writ of error was refused by the Supreme Court of Pennsylvania.

As said by Hurd, in his work on Habeas Corpus: "If a prisoner was sentenced to the penitentiary, on conviction for horse-stealing, for one year, the law requiring imprisonment for such offense for a period not less than three years, the error was held to be no ground for discharge on habeas corpus" (p. 334). The case referred to by Mr. *Ex parte Show*, 7 Oh. St. 81—would seem fully to confirm his statement. But an examination of the case will show a decision to have turned upon the assumption that the judgment was not void, because the Court had jurisdiction over the person of the defendant, and over the offense and punishment—a test which has been held not infallible by the Supreme Court of the United States.

With respect to the case now before us, it is indeed true that the Police Court had jurisdiction over the person of the prisoner and of the offense for which he was tried. "It means follows that these two facts make valid, however erroneous it may be, any judgment the Court may render in each case. If a Justice of the Peace, having jurisdiction to fine a defendant for a misdemeanor, should render a judgment that he be hung, it would simply be void. Why? Because he had no power to render such a judgment. If a Court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on indictment for treason, the Court should render a judgment of attainder, whereby the heirs of the criminal could lose his property, which should, by the judgment of the Court, be confiscated to the State, it would be void as to the property, because in excess of the authority of the Court, as given by the Constitution." (*Ex parte Lange*, 18 Mo. 3.)

In *Bigelow vs. Forrest*, 9 Wall. 339, it was held a decree, under confiscation acts, which in terms ordered the estate of the defendant (a fee simple) to be sold was simply erroneous, but void. The Supreme Court of the United States said: "Doubtless a decree of a Court without jurisdiction to make the decree cannot be impeached generally, but under the Act of Congress the District Court has no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest." (100)

In the case of the present petitioner, the Police Court has no power to impose a fine of less than \$100, or a term of imprisonment except as an alternative or substitute for a fine of \$100 or more. In rendering the judgment it transgressed its jurisdiction. The petitioner cannot be deprived of liberty by means of a void judgment.

It might be admitted that where the law authorizes only one or two distinct kinds of punishment, and a Court imposes both, the defendant may, by satisfying the Court of the punishment he chooses, relieve himself of the other; and this may be protected by the constitutional principle, "no man shall be twice punished for the same offense," from a subsequent attempt of the same Court to render the same judgment which would originally have been the proper judgment. (*parte Lange*.) But it would not necessarily follow from this admission, that if an inferior Court should enter a judgment of imprisonment for a longer term, or fine in a larger sum than it had power or jurisdiction to impose, the judgment would be void against the objection of defendant, would be valid as against him. In *Michigan* a Justice of the Peace entered a judgment "The defendant is fined eight dollars, to pay * * * and to stand committed until paid." The Court, after referring to the statute, said: "The Court may fine, or imprison, or can in his discretion do both, within the limits fixed by the statute; but he cannot imprison for an indefinite period of time. The period must be determined by him judicially, and that, under the statute, cannot exceed the period of three months." True, that the judgment was void, but the judgment was held to be erroneous, not void, because the Justice had no power to pronounce it. It was void. The case was so understood by Mr. Hurd. (*on Habeas Corpus*, 334.) *Gurney vs. Tufts*, 37 Maine 100, presented to the Supreme Court of Maine on a writ of *de homine replegiando*. The statute authorized the Court to sentence the owner, etc., of liquors, "to stand committed for thirty days in default of payment" (of a fine). A municipal Judge had sentenced a defendant to pay

dollars, and that the keeper of the jail keep him, etc., he perform said sentence, or be otherwise discharged course of law." The Supreme Court said: "The state had clearly no authority * * * to impose any sentence, or to commit for a failure to comply there- And the petitioner (the subject of the sentence) was red. It is hardly necessary to add that if the judge one which the Court has no power to pronounce, the e or other executive officer of the Court cannot use egis for his protection. *Robinson vs. Spearman* was n of trespass against a magistrate, which was only able in case his judgment was void. (3 Barn. & 93.) It was said by Abbott, C. J.: "I am of opin- the warrant in this case was illegal, not being such ustice had authority to make. It was his duty to sued the words of the statute. If he had done so, have given the party committed the option either of he money or of staying three months in prison, and hereby altogether discharged from the payment. This is for his imprisonment until he shall pay the etc. *People vs. Riley*, 48 Cal. 594, was an appeal. use for which the defendant was tried was punish- imprisonment for a term not exceeding five years. rt below adjudged the defendant to suffer imprison- a term of ten years. This Court reversed the judg- d remanded the cause, with directions to the lower to proceed to judgment." In none of these cases suggested that the sentence was good for the statutory Nor, if an inferior Court has exceeded the fine it is ed to impose by law, would it seem that the judg- valid to the extent of the fine authorized. To jus- er a judgment it must appear that the Court had render the judgment when it was rendered. Its cannot depend upon the happening of a subsequent s that the defendant shall subject himself to part of punishment.

is not necessary here to decide whether a fine in a sum than that authorized by statute or ordinance nder a judgment absolutely void. The judgment of e Court in the case before us is certainly void, be- s not one which includes any judgment which that s jurisdiction to render in such a case.

been suggested that the letting to hire of a pool he carrying on of a species of gambling or immoral while the statute only permits the board to license etc., "not prohibited by law." We do not take

judicial notice that "pool" necessarily involves game money or value; indeed, are able to discover no reason it should. Even if the expression, "not prohibited" means more than statutory law, we know that no statute prohibits a game not played for value, and are equally sure that such game violates no common law prohibition.

It has been suggested, further, that the Board of Supervisors—authorized to license "callings, trades and professions" only—had no power to impose a license tax upon the proprietor of a pool table, simply because he did not use it exclusively for "family use," but permitted persons to use the saloon to use it, without cost; that the ordinance is invalid because it does not require, as a condition to licensing, that the table shall be kept as a calling or employment, or that it was let to hire, or made a means of profit. But, the ordinance only requires those who make a "business" of keeping a pool table to pay a license, and this is sufficiently apparent from its language. As much as is implied from the very exception, "not used exclusively for family use." The second section of the ordinance of 1889, however, makes the meaning manifest. It reads: "It shall be unlawful for any person to engage in or conduct any business, trade, profession or calling * * * without first taking out or procuring the license," etc. The first section contains a schedule of the rates of license to be paid by persons carrying on certain businesses, trades, professions or callings—among whom are the proprietors of pool tables not kept for family use, the keepers of "ball-rooms," "shooting galleries," etc. In several places no reference is made to the circumstance that the business specified must be conducted for profit. But, from the nature of the subject, the purpose—to secure revenue from trades, etc.—for which the ordinance was adopted; from the very definition of the word "license," as well as from the language of the second section in connection with the enumeration of callings, etc., in the tenth, it is apparent that the prohibition (except license is paid) relates to and only the businesses, trades, professions or callings carried on for profit. Indeed, that not conducted with a view to profit, real or expected, would hardly be a business, profession or calling.

To conclude: While we hold the ordinance to be void, we decide the judgment of the Police Court void.

It may, perhaps, be suggested that petitioner should have been remanded to the custody of the Sheriff, to be held under the warrant of arrest issued upon the com-

cord shows no warrant or service, nor, if there was warrant, that it was served by the Sheriff. The warrant, may have been served by an officer of the municipal and petitioner may have been in his hands until delivered to the Sheriff after judgment; but if it appeared he was originally arrested by a Sheriff's officer, this circumstance ought not to be determinative of the question. The Sheriff now has the body of petitioner as jailer, not in his capacity as arresting officer. This is not a case in which petitioner is held under illegal restraint, and another person, in the same in a distinct capacity, is legally entitled to his release. Here the warrant, if any was issued, has disappeared from its function. Its office was to give to the Court, by the Sheriff, unless bail was given, the control of the defendant. It is stated, that he might be tried and be present for judgment and execution. When a judgment was pronounced, the Court took the defendant from the sureties or Sheriff, as he might be, and placed him in jail. As the sureties and bail bond would be discharged when a judgment was rendered—although not such a judgment as would authorize the Sheriff to keep the defendant in prison, because the law does not intend that the liability of the sureties shall depend upon the validity or invalidity of the judgment—so the Sheriff, as arresting officer, is fully protected by a warrant of the Court of which he is the minister, whether the Court regularly pursues its jurisdiction in rendering the judgment or not, from the time that he surrenders the person of this prisoner in accordance with the terms of the judgment.

There was an appeal from the judgment of the Police Court, and this Court had jurisdiction of the appeal, we remanded the cause with direction that defendant be released—the judgment appealed from being void. (*People v. [unnamed]*, *supra.*) We may suggest that judgment may be rendered upon petitioner (who has been tried and convicted by a Court of competent jurisdiction, but never sentenced, unless, by reason of lapse of time, it would be error to sentence him. (P. C., 1449.) But, as we cannot delay such action, we ought not to permit the petitioner to remain in jail, upon the conjecture that the Court which rendered the judgment (believing that it had power to render it) may become convinced of its invalidity—perhaps after the expiration of the period of illegal imprisonment—and then proceed to fine or imprison him a second time for the same offense.

We are strengthened in our conviction by the circumstance

that never, so far as the reported cases are known it been held, where the return has shown the petitioner be confined under a void judgment of a Court which had jurisdiction to try him, that he was or could be legally deprived of his liberty under the warrant issued at the commencement of the proceedings against him.

The petitioner is discharged from custody.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 2.

[Filed May 3, 1881.]

No. 7627.

JEAN BARON, RESPONDENT,

vs.

CHARLES DELEVAL, APPELLANT.

PRACTICE—NOTICE—WAIVER. If a party is present in Court by counsel at the time the demurrer is overruled, and asks and obtains leave to file an answer, written notice of the overruling of the demurrer need not be given. Under such circumstances the notice is waived.

Appeal from Superior Court, San Diego County.

L. Chase, for respondent.

Brunson and Hotchkiss, for appellant.

MORRISON, C. J., delivered the opinion of the Court.

On the twenty-third day of October, 1879, plaintiff filed his suit in the District Court of San Diego County to foreclose a mortgage on certain real estate situate in the city of San Diego, and on the twenty-fourth day of the same month a demurrer to the complaint was filed on behalf of the defendant. This demurrer was signed by "E. W. Morrison, attorney for defendant;" and at the time of the filing of the demurrer it was duly stipulated that it should not be taken up for consideration until the first day of November, 1879, proposed of for sixty days. On the twenty-sixth day of October, 1879, another demurrer to the complaint was filed by one A. B. Hotchkiss, "attorney for defendant;" but before the same was taken up for consideration, Hotchkiss became such, in the place of the original attorney, and his name does not appear in the transcript. On the thirtieth day of December, 1879, the following order was made by the Court: "Defendant's demurrer to plaintiff's complaint is overruled, and five days allowed defendant to answer." It does not appear which of the two demurrers was overruled.

made that they were not both overruled, and there-
matter is of no consequence. On the seventh day
ary, 1880, the five days allowed the defendant to
having expired, and no answer having been filed, the
of the defendant was entered, and a decree was made
ing the mortgage. No notice in writing was given of
ruling of the demurrer, but it appears from the bill
otions that "the defendant was present in Court by
ney of record upon argument and ruling on the de-
and upon the same being overruled, requested of the
me to answer, and five days time to answer was
" The only point made upon this appeal is on the
of notice.

n 476 of the Code of Civil Procedure provides that
a demurrer to any pleading is sustained or over-
nd time to amend or answer is given, the time so
uns from the service of notice of the decision or
and Section 1010 of the same Code provides that
s must be in writing." This notice was not given, and
tion is: Was the giving of such written notice re-
under the facts disclosed by the record in this case?
ontended, on behalf of the respondent, that the ap-
waived his right to a written notice by applying to
rt for leave to answer; and it is important to remark
onnection that, when the demurrer was overruled, it
in the discretion of the Court either to grant leave
er or to order a final judgment in the case.

ction 472 of the Code of Civil Procedure it is pro-
at "when a demurrer to a complaint is overruled,
e is no answer filed, the Court may, upon such terms
oe just, allow an answer to be filed;" and in the case
vs. *McLaughlin*, 28 Cal. 672, the Court say: "There
error in entering judgment for want of an answer
e overruling of the demurrer." "When a demurrer to
aint is overruled, and there is no answer filed, the
ay, upon such terms as may be just, and upon pay-
costs, allow an answer to be filed." (Pr. Act, Sec.
at it does not follow that it must in all cases be done.
ily the Court should doubtless allow an answer to be
ere the demurrer has been interposed in good faith,
ne ground for supposing that it would be sustained.
his case no leave was asked to file an answer, and
urrer was manifestly frivolous, and confessedly put
tain time, without any intention to rely upon it.
he circumstances there was, it is true, no improper
nded or attempted to be made of it by the attorneys

who put it in. But there was no error in entering upon overruling the demurrer thus interposed."

The complaint in the case now being considered ple one to foreclose a mortgage, a copy of the note inserted in the complaint, and a copy of the mortgage made a part thereof, with a proper prayer for judgment was not pretended, upon the argument of the appellant the complaint was in any respect defective; and it is apparent that the demurrer was a frivolous one, and simply to obtain time. It was therefore within the discretion of the Court to grant or refuse leave to amend notice whatever of the order overruling the demurrer required; and if the Court had immediately entered judgment in the case there would have been no error in the case, therefore, was not one in which any notice, written, was required by the Code. But conceding the purposes of the argument, that it was the absolute right of the appellant to file an answer to the complaint, or a motion would still be in favor of the regularity of the proceeding in the Court below. If the appellant would, under ordinary circumstances, have been entitled to a written notice of the order overruling the demurrer, we are of opinion that such right was waived in this case. The object of the motion and the only purpose it can subserve, is to bring the facts to the attorney knowledge of a fact upon which he is called upon to act. But the right to a written notice, like any other right, may be waived, and we think it was waived in this case. Section 3513 of the Civil Code provides that "one may waive the advantage of a law intended for his benefit." Section 3528 of the same Code provides that "the law respects form less than substance," and Section 3529 declares that "the law neither does nor requires idle ceremony."

In this case the appellant's attorney was present when the decision of the Court overruling the demurrer was announced, and thereupon asked and obtained leave to file an answer within five days. Can he be heard now to say he did not have written notice of the decision? We suppose would a written notice of a fact of which the attorney had direct and positive knowledge have subserved any purpose? It is not to be supposed that it would have been a vain and idle ceremony to have a written notice under the circumstances disclosed in this case? And not only did the attorney have actual knowledge of the fact that his demurrer was overruled, but he acted upon such knowledge by asking and obtaining leave to file his answer within five days. To hold that the appellant and his attorney were not bound by this proceeding

court, would be trifling with justice, and also subversound principles of law and morals. (*The Georgia Company vs. Strong*, 3 Howard's Pr. Reports, 245.)
 ment affirmed.

concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed April 25, 1881.]

No. 6061.

OSGOOD, APPELLANT,

vs.

EL DORADO WATER DITCH COMPANY, RESPONDENT.

RIGHTS—UNITED STATES LANDS—PATENT—DITCH AND CANAL OWN—RELATION. Plaintiff obtained a patent from the United States land after defendant's grantors had taken the necessary steps to appropriate, and were in the active prosecution of work necessary to appropriate, for mining, agricultural and other purposes, water flow through the land covered by plaintiff's patent. The sufficiency of ice, and diligent prosecution of the work to completion, were and in favor of the grantors of defendant: *Held*, on completion of work, the right of defendant's grantors related back to the commencement thereof; that they acquired a vested right to the water prior to the issuance of plaintiff's patent, and, under the Act of Congress of July 23, 1866, granting the right of way to ditch and canal owners over the public lands, plaintiff could not restrain the defendant from diverting the water.

al from Eleventh District Court, El Dorado County.

McFarland, for appellant.

Hard, Haymond, Garber, Thornton & Bishop, for respondent.

J., delivered the opinion of the Court:

appears from the record that in the year 1856 a man by the name of Kirk conceived the idea of constructing a canal in the vicinity of Placerville, in El Dorado County, for the purpose of conducting water from various sources of water in the Sierra Nevada Mountains to the foot-hills and below, for mining, agricultural and other useful purposes. There were many obstacles in the way of the undertaking for the country through which the waters had to be conducted was, in great part, rough and mountainous, and the winter so severe that the working season consisted of only a few months only. According to Kirk's testimony, he in 1856, a survey for the canal, and also a survey of Clear Lake, Clear Lake and Silver Creek, posted notices

claiming their waters, and did other work; all at about \$1,000. In 1858 he ran the lines over with engineers from "Coon Hollow," a point about three of a mile south of Placerville, to the mouth of Alameda on the American River, stuck a stake every chain, cleared brush out, made benches about every half mile, and a reservoir site about seven miles above "Coon Hollow." Rain and snow then coming on, further work was postponed. The line so run was about sixty miles long, and cost \$1,500. In 1860 Kirk prospected the country for a better line. He then commenced a bench at the mouth of Alder Creek, and ran the line up to Cedar Rock on the American River, where he located a dam, contracted a carpenter to construct the flume and gates, employed men to cut out timbers for the dam, and had a large pile of cut timber cut out of the river in order to run the water into the ditch. In the same year (1860) he located other lakes, Echo Lake by posting a notice at the mouth of the river where the present ditch commences, "claiming it for a reservoir to keep the water back to supply this ditch." A dam was built on this line, located in the year 1860, and also a dam on the waters of the lake for the purpose of supplying the present line of ditch—that is to say, the ditch of the American River as finally completed, and which was finally located in 1860. At that time (1860) the work consisted of a dam from Sportsman's Hall (in the vicinity of Placerville) to Cedar Rock; from the latter point to Silver Lake, and a dam to Clear Lake; and from Cedar Rock up the American River to Audrian's Lake, Echo Lake and Slippery Falls. After the passage of the Act of Congress of July 13, 1866, to wit, in February or March, 1867—Kirk posted at Lake a notice, of which the following is a copy:

"In conformity with an Act of Congress entitled 'An Act granting the right of way to ditch and canal owners on the public lands, and for other purposes,' approved March 3, 1866, the undersigned hereby claim, and are by priority of location entitled to, the use of the water of this stream for mining, manufacturing, agricultural and other purposes. We intend to dam said stream and carry the same, or a portion thereof, in a flume, ditch or canal, or by natural means wherever found suitable, to certain mining and agricultural districts; and that the construction of said flume and ditch will not injure any settler on the public domain.

"February, 1867.

"J. KIRK

"F. A. H.

to the posting of this last mentioned notice, which stated one, Kirk had conveyed one-half of his interest in the works and waters to Bishop. In 1868 he (Kirk) turned the lower end of the canal, and on the upper end of the same, a dam. In July, 1871, he completed the dam at Cedar Rock, and turned into the head of the ditch all the water which was in the river. The same year (1871) he had men at work grading the ditch at Sportsman's Hall, three or four miles from Bishop, which were dug that and the next year. He worked on the canal every season from 1868 until the defendant's sale of the canal, works and water rights, which was in April, 1873. From 1869 to July, 1871, he expended \$20,000 in the construction of the canal, and from 1868 to April, 1873, he expended \$20,000 in its construction. In the spring of 1871 he put six or eight men at work constructing a dam at Echo Lake, and they continued to work on it every season. In April or May, 1872, he posted another notice at Sportsman's Hall, claiming its waters, and also a like notice at Silver Lake, Cedar Rock and other points. In the spring of 1872 he commenced work on the canal at the outlet of Echo Lake, when he put in a small dam, and some work grading the ground for a flume, in order to turn the water of this lake into the American River by the dam of Cedar Rock. This work, as also the work on Silver Lake and Cedar Rock, was a portion of the canal now completed. The waters of Echo Lake were turned into the American River, and from that into the canal at Cedar Rock. The line of ditch as now constructed from Echo Lake and Silver Lake to Sportsman's Hall was first located and determined in 1860. With the approach of the winters and rainy seasons, when it could be performed, the work was constantly prosecuted from the fall of 1870 until it was completed. The ditch from Cedar Rock to Sportsman's Hall was projected and constructed for the purpose of taking the waters of Echo Lake, Silver Lake and the other waters mentioned, and would not have been constructed but for that purpose.

Regarding is the substance of Kirk's testimony, considering we must consider it, in view of the verdict and the opinion in defendant's favor, in its most favorable light. In some respects his testimony is supported by other evidence in the case, and in some respects it is not; but the Court below pronounced in its favor, and we must accept it as true.

The purchase by defendant, work upon the canal and

its branches was vigorously prosecuted, and was in the year 1876 at great expense. Upon its the defendant diverted, through and by means water of Echo Lake, except a small portion which mitted to flow down its natural channel.

For this diversion the plaintiff, on the third 1876, commenced the present action to restrain from diverting any of the water of Echo Lake, right to the relief sought upon the alleged fact (plaintiff) is the owner in fee of a certain tract through which the said water in its natural course that, as riparian proprietor, he is entitled to the rupted and undiminished flow of the water in course. The evidence on behalf of the plaintiff patent issued to him by the government of the United under date of October 25, 1871, which recites that a payment for the land described has been made by plaintiff according to the provisions of the Act of Congress of the fourth of April, 1820, entitled "An Act making provisions for the sale of the public lands." * United States of America, in consideration of the and in conformity with the several Acts of Congress cases made and provided, have given and granted these presents do give and grant unto the said Osgood and to his heirs the said tract above described have and to hold the same, together with all privileges, immunities and appurtenances of the nature thereunto belonging unto the said Nemmi and to his heirs and assigns forever."

The land described in the plaintiff's patent is one mile in length by a quarter of a mile in width located that the water flowing from Echo Lake, in its course, enters its upper boundary about one mile outlet of the lake, and passes through the entire tract, uniting, however, before leaving it, with the Little Truckee River. The plaintiff first acquired this land in the year 1863, as a toll-gatherer on a toll-road. The same year he also commenced raising but the collection of tolls was his principal business that date he has resided on the land with his family during the winter seasons, which are long and cold for a residence there. When the plaintiff first acquired the land it was public, unsurveyed land of the United States. At the trial he testified: "The United States Survey commenced to survey there in 1865. I filed my statement in the local United States Land Office

claiming this land as a pre-emptor, on the eleventh day of June, 1868. I proved up and paid for the said land on the twenty-second day of June, 1870."

The plaintiff seeks to invoke the doctrine of riparian rights, but for obvious reasons no case was made for the application of that doctrine. (*Megerle vs. Ash*, 33 Cal. 41; *Lansdale vs. Lansdale*, 43 Cal. 41; *Smith vs. Athern*, 34 Cal. 41; *Daniels vs. Lansdale*, 10 Otto (U. S.), 118.) The rights must, therefore, be held to have attached on the 10th of October, 1871—the date of the issuance of the license. But at that date, according to the testimony of the defendant, the active prosecution of the work on the canal for the irrigation of the waters of Echo Lake. It may be said upon the question as to whether, all things considered, the defendant's grantor prosecuted the work with reasonable diligence from its inception, we think there is no doubt that there is evidence in the record to show reasonable prosecution of the work from the spring of 1870 until its completion, which testimony was sustained by their verdict, found to be true. This was a question for the jury, and we cannot say that the evidence sustains their finding in this respect. The question was also one for the jury. Kirk testified that by his deed posted by him at Echo Lake in 1860, he claimed the waters of that lake for the purpose of supplying the ditch finally located in 1860, and as finally completed by the defendant; and also claimed the lake as a reservoir to store water for the purpose of supplying the ditch. According to his testimony he had, also, at that time surveyed and located the line of ditch from Sportsman's Hall Rock, and from thence, among other branches, a ditch to Echo Lake; and the line so surveyed and located was marked by stakes, the blazing of trees, etc. Thereafter, from time to time, work upon the canal, at considerable cost, but whether with sufficient diligence, had the defendant intervened, need not be determined. After the passage of the Act of Congress of July 26, 1866, the ninth section of which declared that "whenever, by priority or otherwise, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the customs, laws, and the decisions of courts, the possessor and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes

aforesaid, is hereby acknowledged and confirmed. The notice posted at Echo Lake a printed notice, a copy of which has been already inserted in this opinion. This notice was posted by Kirk in 1867, and about the same time a similar notice at the other sources of supply, and the waters were at that time claimed by himself and Bishop. The notices having then acquired one-half of Kirk's interest.

We discover nothing in the notice of 1867 in which was the part of Kirk and Bishop any intention to appropriate the claim to the waters in controversy. The same is the case of the notice posted by them in 1872. The fact that the notices were an assertion of their claim, not a grant of right, and, by all of the authorities, the notices are to be liberally construed. Leaving out of consideration the notice of 1860, by that of 1867 the plaintiff or any other person would have seen that Kirk and Bishop claimed to appropriate to the waters of Echo Lake for mining, manufacturing, agricultural and other purposes, and that they intended to divert the stream and take the water, for the purposes of use in a flume, ditch or canal, or by natural channels, if found suitable. Looking further he would have seen that the proposed ditch staked and marked upon the ground was finally completed, and through which the water was finally diverted. It was for the jury to say whether the testimony introduced on the part of the defendant was true. If true, it was sufficient, in our opinion, to sustain the claim, showing that the grantors of the defendant gave notice of their intention to appropriate the water of Echo Lake (see *vs. Gearhart*, 12 Cal. 28.) This water belonged to the Government of the United States, and was, by the local laws, and the decisions of the Courts, subject to appropriation for the purposes for which the defendant sought to appropriate it; and the Supreme Court of the United States, in *Broder vs. Water Company*, 11 Cal. 47, declared it to be the established doctrine of the law that "that rights of miners who had taken possession of the land and worked and developed them, and the rights of persons who had constructed canals and ditches to be used for agricultural operations and for purposes of agricultural irrigation in a region where such artificial use of the water was a necessity, are rights which the government had long since recognized and encouraged, and was bound to protect before the passage of the Act of 1866;" and the court further declared "We are of opinion that the section of the Act of 1866 which has been quoted (the ninth section) was rather a recognition of a pre-existing right of possession, c

aim to its continued use, than the establishment of
e."

inciple of prior appropriation of water on the public
California, where its artificial use for agricultural,
nd other like purposes is absolutely essential, which
ong been recognized and sanctioned by the local
laws and decisions, was thus expressly recognized
tioned by the Supreme Court of the United States,
by the Act of Congress of 1866. And in keeping
policy, Congress further provided, in Section 17 of
datory Act approved July 9, 1870 (Copp's Mining
s, 1873-74, p. 296), "that all patents granted, or
ions or homesteads allowed, shall be subject to any
nd accrued water rights, or rights to ditches and
s used in connection with such water rights, as may
n acquired under or recognized by the ninth section
et of which this is amendatory," to wit, the Act of
1866.

efendant's grantors therefore had the right to appro-
e water in controversy, and if they acquired a vested
rein prior to the issuance of the plaintiff's patent,
tiff's rights, by express statutory enactment, are
n the rights of the defendant. This, of course, de-
the question whether the grantors of the defendant
alid appropriation of the water, and this, in turn, on
ion whether they gave proper notice of their inten-
appropriate it; and, if so, whether they prosecuted
in that behalf with reasonable diligence. If they
icient notice, and prosecuted the work with reason-
gence, there can be no doubt that, on the completion
ork, their rights related back, at least, to the com-
ent of the work. In this case the jury found in favor
efendant on both propositions, and, as observed
in view of the verdict, we think there is sufficient
of notice and of due diligence in the prosecution
ork from a date anterior to the acquiring of any
y the plaintiff. We think further, from the whole
hat substantial justice has been done by the jury
Court below between the parties litigant.

ew we have taken of the case renders it unnecessary
er the other questions which have been elaborately
y ably argued by the learned counsel for the
ent.

ent and order affirmed.

ncur: Myrick, J., Sharpstein, J., Morrison, C. J.
ssent: McKinstry, J., Thornton, J.

DEPARTMENT No. 1.

[Filed April 22, 1881.]

No. 7621.

STEWART, RESPONDENT,

VS.

WHITLOCK ET AL., APPELLANTS.

MORTGAGE BY MARRIED WOMAN—INTENTION. A mortgage executed in the mode prescribed by law, by a married woman, cannot be set aside on the ground that her intention not disclosed to the mortgagee.

Appeal from Superior Court, San Bernardino County.

Byron Waters, for respondent.

Willis & Littlepage, for appellants.

By the COURT:

The plaintiff advanced his money and took his mortgage duly executed by defendants Alma Whitlock and Isabel, without any notice or knowledge of the actual representations made by the former to the latter with reference to the lands described in the mortgage.

The Court below found as follows:

"That at the time said mortgage of date August 1880 was executed, the defendant Isabel was by the Notary Public examined separate and apart from and without the presence of her husband, and by said Notary then made a mortgage with the contents thereof. That the defendant Isabel directed some change to be made in the wording of said mortgage, by which she intended to exclude any portion of lots three and eighteen, which change was accordingly made, and thereupon, while so separate from and without the presence of her husband, and being acquainted with the meaning and reading of said mortgage, she acknowledged to said Notary that she executed the same freely and voluntarily, and did not wish to retract such execution, and thereupon the Notary Public attached to said mortgage a certificate of acknowledgment in due form as required by law."

The Court found that defendant Isabel Whitlock intended to include in the mortgage any portion of lots three and eighteen. Her mere intention (uncommunicated to the plaintiff, either by the writing itself or otherwise) did not control the plain letter of her contract, executed with all the formalities required by law—in the execution of which she was of her property by married women, and with full knowledge of the actual contents of the instrument.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7421.

APPELLANT, vs. BASSETT ET AL., RESPONDENTS.

AGENT—RATIFICATION MISTAKE. A principal is not bound by approval of an act already done, made under a misapprehension of the real nature of the facts. To constitute a ratification, the principal must be acquainted with that which has actually been done.

from Superior Court, Santa Barbara County.

Hatch and *R. B. Caulfield*, for appellant.
Stratton, for respondents.

COURT:

Court instructed the jury:

acts of an agent can be ratified only after full knowledge of those acts, and the principal must know the character of the acts to be ratified, otherwise a ratification is void. A ratification can be made under misapprehension of the full facts, it is voidable to the extent of the mistakes, and the party can be relieved so far as there was a mistake in fact."

Argument of appellant's counsel is:

The second clause of the instruction informs the jury to the effect that if Mrs. Bassett was under a misapprehension of the facts of these transactions, she might retract her ratification as to them, and be relieved from liability to the extent to which she was mistaken as to what plaintiff had done.

The first clause informs the jury to the effect that she must have full knowledge of his acts—i. e., knowledge of the facts of the transactions in question, any ratification she may make will be wholly inoperative. This, we contend, is error.

The court might, perhaps, have been better expressed, but the court is of opinion that the instruction conveyed to the jury the position that an alleged principal was not bound by approval of an act already done, made under a misapprehension of the real nature of the facts; that, to constitute a ratification, the principal must be acquainted with that which has actually been done. This was not error.

Verdict and order affirmed.

Concurrence in the judgment: Thornton, J.

IN BANK.

[Filed May 3, 1881.]

No. 7317.

PEOPLE, RESPONDENT, vs. TAYLOR, APPELLANT.

OATH OF OFFICE—OFFICIAL BOND. The failure to file the official bond within ten days after receiving notice of a vacancy which may be filled by appointment of the supervisors.

Appeal from Superior Court, Mono County.

Attorney-General Hart and T. A. Stephens, for Reddy and Gorham, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court.

At the annual election held in September, 1877, Bert Patterson was elected Sheriff of Mono County for a term of two years, from the first Monday of January, 1878. He duly qualified and entered upon the duties of the office, which he continued to discharge until the 29th day of September, 1878, when he died; and on the 5th of September, 1879, the Board of Supervisors of said county duly appointed the appellant herein Sheriff of said county, who duly entered upon the discharge of the duties of said office, and he still continues to hold.

On the 3d day of September, 1879, the relator was duly elected Sheriff of said county, and the writ of habeas corpus was duly issued to him on or about the 10th day of September, 1879. Before the first Monday of January, 1880, he filed his oath of office and official bond. The writ of habeas corpus was not filed within ten days after he received notice of his election—the time prescribed by law. On the 4th of March, 1880, the Board of Supervisors, deeming said office vacant, appointed Showers, to fill said vacancy, and within ten days after receiving notice thereof he duly qualified by filing the oath of office and official bond, and demanded of appellant to be put in possession of the office under said appointment. Appellant refused to comply with said demand; whereupon the Attorney-General, upon the relation of Showers, brought an action against the appellant to have him ousted from the office. The relator was admitted into, said office. Judgment was rendered against the appellant and in favor of the relator, and from that judgment this appeal was taken.

The arguments of counsel have been main-

whether, in contemplation of law, a vacancy existed in the office at the time when the respondent claims that he was appointed by the Board of Supervisors.

It is urged, on behalf of the appellant, that he was appointed to hold the office during the unexpired term of his predecessor, and until his successor was duly elected and qualified, and that the failure of the person duly elected to qualify did not create a vacancy in the office. It is conceded that the relator, by reason of his failure to file his oath of office and official bond within ten days after receiving notice of his election, is not, by virtue of said election, entitled to the office. (P. C., Sections 907, 947, and 996.) The decision in this case, therefore, hinges upon the question of the validity of the appointment of the relator by the Board of Supervisors, and the validity of that appointment depends upon there being a vacancy in the office when it was made. The office becomes vacant on the happening of either of the following events before the expiration of the term: the death of the incumbent.

* * * * *

is refusal or neglect to file his official oath or bond within the time prescribed." (Political Code, 996.) The relator was duly elected and neglected to file his official oath or bond within the time prescribed, and that event occurred before the expiration of the term for which he was elected. Did not the office thereupon become vacant? It is contended that it did not, because the relator was not, at the time of his refusal or neglect to file his official oath and bond, the incumbent of the office. But it seems to us that such construction would render the provision nugatory. The relator can become an incumbent of the office of Sheriff only after he has filed his official oath and bond. The relator's neglect to file an official oath or bond must always be a disqualification, and can never succeed, the incumbency. So that the construction contended for by the appellant be the correct one, no vacancy in the office of Sheriff can ever be created by reason of the refusal or neglect of the person duly elected to the office to file his official oath or bond. It is the duty of the Court to give to this provision the force and effect which it was intended by the Legislature that it should have. No such intention can be ascertained; and we think it is not doing violence to the language of the statute to construe it to mean that the refusal or neglect of a person duly elected to an office to file his official oath or bond within the time prescribed by law, creates a vacancy, and that the term for which he is elected commences,

which may be filled by the proper appointing other words, that this provision of the Code requires a person duly elected to an office as the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he dies or not. We are, therefore, of the opinion that the relator was, within the meaning of the Code, not a vacancy in office, an incumbent of the office of Sheriff of Mono County from the time of the commencement of the term for which he was elected until the expiration thereof, although by reason of his refusal or neglect to file his oath and bond, within the time prescribed by law, he was not entitled to the possession of the office by virtue of his election.

If there was a vacancy, the Board of Supervisors has the power to fill it by appointment; and that Board has appointed the relator, and he, having duly qualified himself on the date of said qualification, is entitled to the possession of the office until his successor should be duly qualified.

Judgment and order denying a new trial affirmed.

We concur: Myrick, J., Thornton, J., McKee, J.

IN BANK.

[Filed April 22, 1881.]

No. 10,608.

PEOPLE, RESPONDENT, vs. GARCIA, APPELLANT.

INDICTMENT—FORMER CONVICTION—EVIDENCE. An indictment returned against the defendant is accused, etc., of the crime of grand larceny; that said defendant was indicted by the grand jury, etc., for grand larceny; that he was brought before the Court, and convicted of the crime of grand larceny, followed by a second indictment for grand larceny subsequently committed; that the indictment containing the charge of prior conviction of a crime of grand larceny. The prosecution introduced the "Register of Criminals" of the county, showing a former conviction of defendant of the same offense: *Held*, sufficient evidence to go to the jury.

Appeal from the Superior Court, Los Angeles.

Attorney-General Hart, for respondent.

H. Bell and F. P. Ramirez, for appellant.

By the COURT:

We are of opinion that the indictment is valid and good, and that there was sufficient evidence of a conviction. There is no error in the record.

Judgment and order affirmed.

IN BANK.

[Filed May 2, 1881.]

No. 10,622.

JAMES L. CRITTENDEN, ON HABEAS CORPUS.

FINE—IMPRISONMENT. A contempt of Court is a specific criminal offense, and the imposition of a fine for such contempt is a judgment in a criminal case. It is lawful for the Court inflicting a fine for contempt to order that the party stand committed until the fine is paid, the imprisonment to be for a period of one day for every two dollars of the fine.

Moses, for petitioner.

Smoot, contra.

COURT:

Petitioner was adjudged guilty of contempt by the Court of San Francisco County, and was ordered to pay a fine of one hundred dollars and to stand committed to County Jail for a period of one day for every two dollars unpaid portion of the fine. The order of the Court upon the facts constituting the contempt, and we are of opinion that the facts show a case of contempt under the provisions of the Code of Civil Procedure.

It is claimed that it was not competent for the Court to commit the petitioner under an order or judgment simply to pay a fine. In the case of *New Orleans vs. Steamship Company*, 392, the Supreme Court of the United States held that Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case, and that part of the decree is as distinct from the residue as a judgment upon an indictment for perjury. In *Ex parte*, a deposition read at the hearing." * * * In *Ex parte*, Mr Justice Blackstone said: "The sole remedy for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective

question of contempt of Court, and the punishment therefor has recently undergone a thorough examination in the case of *Fisher vs. Hayes* (January 26, 1881), and reported in the Federal Reporter of March 29, 1881. In that case Mr Justice, J., says: "It is suggested that Section 725 provides for the punishment of a contempt by a fine or imprisonment, and that, therefore, a commitment for non-payment of

the fine is unlawful, because such commitment is not a punishment. There is, however, no commitment or imprisonment if the fine be paid. There is not commitment and imprisonment if punishment by a fine is fully inflicted, under the order, if the fine be paid as the order directs, in which case there can be no commitment. So, if there is commitment for non-payment of the fine, there must be a charge as soon as the fine is paid. The payment of the fine is the punishment. The awarding or infliction of a fine is not a punishment. The commitment is an incident to the fine. It is not, in any manner, the 'imprisonment' allowed by the statute. The payment of the fine, and a commitment for non-payment of it, cannot co-exist. The commitment is not a punishment or imprisonment added to the payment of the fine. It is in view that it has always been held that the statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of Court or for an offense, it is lawful for the Court inflicting the fine to commit the party to prison until the fine is paid, although there be no specific affirmative grant in the statute to make such direction."

The learned Judge then proceeds to cite numerous authorities in support of his view of the law.

We are of opinion that it was competent for the Court to make the order complained of in this writ, and therefore the writ is dismissed and the petitioner's costs awarded.

IN BANK.

[Filed May 2, 1881.]

No 6604.

McDONALD vs. McELROY.

By the COURT:

Ordered that petition for hearing in bank be granted. The attention of counsel is called to the questions.

1. Is plaintiff, under his allegations, entitled to a writ of habeas corpus?
2. Is the language of the deed set forth in the petition (relating to Minna Street) a covenant?
3. If so, is it a covenant running with the land, binding upon the heirs, although they are not named in the deed?

Pacific Coast Law Journal.

II.

MAY 28, 1881.

No. 14.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed May 14, 1881.]

No. 7457.

E, APPELLANT, VS. HIS CREDITORS, RESPONDENTS.

Y PROCEEDINGS—NOTICE—PUBLICATION. An order fixing the time meeting of creditors, and directing notice made on May 21, 1879—time fixed being June 23, 1879—and the publication of the notice made on May 23d, May 30th, June 6th and June 13th of the year, is a sufficient compliance with the insolvency law. The age of the Court is not the person to name the paper in which publication of notice is to be made; he simply fixes the time, and directs ice to be given, and the Clerk gives the notice.

al from County Court of Yolo County.

Sprague, for appellant.

all, Craig & Grant, for respondents.

the COURT:

order of the Court below, made June 22, 1880, was as for the following reasons:

the order fixing time for meeting of creditors, and di-notice, was made May 21, 1879. The time fixed for ting was June 23, 1879. The notice was published l, May 30th, June 6th and June 13th. This was suffi-

the order directed the notice to be published in the *d Democrat*. The affidavit states that the publica-made in the *Woodland Daily Democrat*. This was r. The statute does not direct that the Judge shall e paper in which the notice is to be published. The to fix the time, and direct notice to be given, and k is to give the notice.
reversed.

IN BANK.

Filed May 7, 1881.

No. 6885.

THE PEOPLE OF THE STATE OF CALIFORNIA,
APPELLANT,

VS.

J. H. BUDD ET AL., RESPONDENTS

MISDEMEANOR—BAIL BOND—FORFEITURE—APPEARANCE OF
 bail bond given in a case of misdemeanor cannot be
 forfeited solely on the ground that the defendant failed
 to appear personally when called for trial. The appearance of a def
 with misdemeanor is not absolutely necessary for the t
 against him.

Appeal from Fifth District Court, Stanislaus C

Attorney-General Hart, for appellant.*J. H. Budd*, for respondents.

'MORRISON, C. J., delivered the opinion of the

It appears from the record in this case that on
 of October, 1875, an order was made by the Hon
 Booker, then Judge of the Fifth Judicial District
 one J. H. McDonald to bail in the sum of \$500,
 undertaking was given, in pursuance of said or
 terms of the statute, for that amount. The unde
 signed by the defendants, and the offense charge
 demeanor.

Afterwards an indictment was found and prese
 McDonald, and on the 27th day of March, 1876,
 regularly called for trial in the County Court o
 County, and the defendant being absent, he w
 there called by the Sheriff, and failed to appe
 proper person or by attorney, whereupon the C
 made an order declaring the bond entered into by
 ants forfeited. The action is brought upon this
 dertaking, and the order of forfeiture is relie
 plaintiff as giving a right of action.

The condition of the undertaking sued on is
 above-named J. H. McDonald will appear and
 charge above mentioned in whatever Court it ma
 cuted, and will at all times hold himself amen
 orders and process of the Court, and if convicted
 for judgment and render himself in execution th

to perform either of these conditions, then he will

When the indictment was found, the defendant appeared in court and interposed a plea of not guilty, but did not appear for the case was called for trial. The case was not tried and therefore there was no conviction; but the Court, as previously already remarked, declared the bond forfeited on account of the failure of the defendant to be present at the trial. The simple question is, does this show a breach of any conditions of the bond? The Court affirmed the order of the Court declaring a forfeiture? Section 977 of the Penal Code provides that "if the indictment is for a felony, the defendant must be personally present at the trial; but if for a misdemeanor, he may appear upon the trial by counsel."

Section 978. When his personal appearance is necessary, and he is in custody, the Court may direct, and the defendant, whose custody he is must bring him before it to be

Section 979. If the defendant has been discharged on bail, and has deposited money instead thereof, and do not appear for arraignment when his personal attendance is necessary, the Court, in addition to the forfeiture of the under-bail, or the money deposited, may direct the Clerk to issue a bench warrant for his arrest."

Section 980. It is only in cases where his personal attendance is necessary to the arraignment.

Section 1043 is as follows: "If the indictment is for a felony, the defendant must be personally present at the trial; if for a misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the Court may, upon application of the District Attorney, by an order or warrant, require the personal attendance of the defendant at the trial."

In this case no such application was made by the District Attorney, and no order of the Court was entered requiring the personal attendance of the defendant.

On the facts of this case, and the foregoing provisions of the Penal Code relating to proceedings in criminal cases, it is clear to our minds that the defendant was not required to be personally present at the trial, and that there was no provision of law which prevented the Court from proceeding with the trial of the case in the defendant's absence. It is a part of the conditions of the undertaking given by the defendant that the defendant should be present at the trial.

trial, and; therefore, the failure of the defendant to appear in Court when his case was called for trial was no breach of the conditions of the undertaking. In *The People vs. Ebner*, 23 Cal. 159, the Court in Section 259 of the Criminal Practice Act provides that if the indictment be for a felony, the defendant must be present; but if for a misdemeanor, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel. Section 320 also provides: 'If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant; but if for felony, he must be present.' So, also, Section 415 provides that in a misdemeanor the verdict may be rendered in the absence of the defendant. A forfeiture must be strictly proved on the record discloses that the Court of Sessions had no authority to enter a default or to declare the repleading forfeited."

It is provided also by Section 1148 of the Penal Code that "if indicted for a felony, the defendant must, if a verdict is received, appear in person. . . If for a misdemeanor, the verdict may be rendered in his absence."

It will be seen that the provisions of the Penal Code are substantially the same as were the provisions of the Criminal Practice Act. The case of *The People vs. Ebner*, above, holds that it was error to declare the repleading forfeited because the defendant failed to appear personally and plead to the indictment; and in this case it was equally erroneous for the Court to declare the bond forfeited because the defendant failed to appear personally at trial. Such personal appearance was not required by the conditions of the undertaking.

Such was also the rule at common law. In *Steele vs. Commonwealth*, 3 Dana, 84, the Court said:

"Hiram Steele, who was recognized to answer for his appearance, having unlawfully setting up and keeping a gang, and having failed to appear, his recognizance was, at the instance of his surety, respited; and a jury, sworn to try the case, returned a verdict of 'guilty,' the Court rendering judgment for \$500 penalty.

"This appeal prosecuted to reverse the judgment on three questions: 1st. Was it proper to 'try the case in the absence of the appellant's absence,' etc.

In prosecutions for felony, the accused cannot be tried in his absence; but a prosecution for a pecuniary penalty may be tried, like a civil action of debt, whether the defendant appear or not. According to Mr. Chitty, "even

or an ordinary misdemeanor could be tried at common law without the appearance of the accused. In such a case the jury did not, as a prosecution for felony, amount to a conviction; and, therefore, if a personal appearance could be had, the delinquent might nevertheless be tried." (Citty's Criminal Law, 411-12.)

In the latter case of *Canada vs. Commonwealth*, 9 Dana, it was held that a prosecution for misdemeanor may be maintained in the absence of the accused when he is under legal disability. Mr. Chief Justice Robertson, delivering the opinion of the Court in that case, says:

"That requisition was only intended to afford to the Commonwealth security for satisfaction in the event of conviction, as decided in the case of *Steele vs. Commonwealth*, 10, 84, we are satisfied that the British practice has been in fact, recognized and confirmed here by legislative enactments; and that, consequently, when, as in this case, the accused has been recognized to appear, he may be tried whether he appear or not."

The judgment is reversed and the cause remanded, with directions to enter a judgment in favor of the defendants. Concur: Myrick, J., Sharpstein, J., Thornton, J., and Berry, J., Ross, J.

DEPARTMENT No. 2.

[Filed May 16, 1881.]

No. 10,640.

PEOPLE, RESPONDENT, vs. SPECHT, APPELLANT.

LAW—APPEAL—INFORMATION. An order, made subsequent to the sustaining of a demurrer to an indictment, that the District Attorney file an information against the defendant is not appealable.

Appeal from Superior Court, Colusa County.

District Attorney-General Hart, for respondent.

Support and Hatch, for appellant.

THE COURT:

On the order sustaining the demurrer to the indictment the court made an order that the District Attorney file an information against the defendant. The appeal is from this order.

The order is not an appealable one.

Appeal dismissed.

IN BANK.

[Filed May 7, 1881.]

No. 7658.

CAMRON, PETITIONER,

VS.

KENFIELD, CONTROLLER OF THE STATE OF CALIFORNIA,

AND

WEIL, TREASURER OF THE STATE OF CALIFORNIA,

RESPONDENTS.

PROHIBITION—CONSTITUTIONAL LAW. The writ of prohibition is the writ as known to the common law. The office of the Controller is to restrain subordinate Courts and inferior judges from exceeding their jurisdiction. The Legislature has no power to extend its operation to boards or officers exercising ministerial functions.

Prohibition.

*James A. Waymire and W. H. Sears, for petitioner;
Attorney-General Hart, for respondents.*

By the COURT:

This is a petition for a writ of prohibition to restrain the Controller to refrain and desist from drawing upon the Treasury in payment of any claims arising under the Act of April 23, 1880, entitled "An Act to provide for the drainage," and the Treasurer from paying out upon such warrants.

Section 4 of Article VI of the Constitution of California provides that the Supreme Court shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus." The same language was employed in the case of *Spring Valley Water Works vs. The City and County of San Francisco*, 52 Cal. 111, it was said: "At the common law the writ of prohibition was issued on the suggestion of a cause originally, or some collateral matter arising out of the cause, did not belong to the inferior jurisdiction, but to the jurisdiction of some other Court. It was an original remedy provided as a remedy for the encroachment of jurisdiction. Its office was to restrain subordinate Courts and inferior judicial tribunals from exceeding their jurisdiction."

In *Maurer vs. Mitchell*, 53 Cal. 291, it was said: "It is the opinion of the Court that the writ mentioned in the Constitution is the writ of prohibition as known to the common law." In *Spring Valley Water Works vs. The City and County of San Francisco*, 52 Cal. 111, it was said: "At the common law the writ of prohibition was issued on the suggestion of a cause originally, or some collateral matter arising out of the cause, did not belong to the inferior jurisdiction, but to the jurisdiction of some other Court. It was an original remedy provided as a remedy for the encroachment of jurisdiction. Its office was to restrain subordinate Courts and inferior judicial tribunals from exceeding their jurisdiction."

the two cases are decisive of the present application. The time of the decision in *Maurer vs. Mitchell*, Section of the Code of Civil Procedure read: "The writ of prohibition is the counterpart of the writ of mandate. It is the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of jurisdiction of such tribunal, corporation, board or person." It was decided that this language did not require the Court to hold that the office of the writ had been exhausted. Such construction of the statute, however, did not follow that was said in respect to the meaning of the Constitution mere *dictum*; it only furnished another and separate reason why the writ should be denied in that case. It is as well to be urged that what was said in *Maurer vs. Mitchell* with reference to the meaning of the section of the Code was unnecessary to the conclusion reached by the Court, and, by such reasoning, a case which distinctly decides two questions would become an authoritative decision of neither. The new Constitution was framed on the basis of the construction of the language used in the former Constitution, unanimously concurred in by the members of the highest tribunal of the State; yet the framers of the new Constitution repeated the words employed in the old. We are forced to the conclusion that they used the words in the sense which had been attributed to them by the Supreme Court.

It follows that the Legislature had no power to enact the Act which purports to amend Section 1102 of the Code of Civil Procedure, and to provide that the writ shall arrest the proceedings (in excess of jurisdiction) of any tribunal, corporation, board or person, "whether exercising functions of a judicial or ministerial," in so far as it attempts to extend the writ. The writ is denied and proceedings dismissed.

CONCURRING OPINION.

In concurring in this opinion I limit it to the extension of the writ mentioned therein by the Act of the Legislature to cases of original jurisdiction of this Court. I do not think such extension can be added to by the Legislature. It may be that the Legislature has the power to extend the scope of a writ of the kind spoken of in the opinion, whether it be *certiorari* or not, to the Superior Courts; but on this point no definite judgment is here intended to be expressed: *W. J. J.*

IN BANK.

[Filed May 7, 1881.]

No. 7711.

CAMRON, PETITIONER,

VS.

WEIL, STATE TREASURER, ETC., RESPONDENT.

GENERAL FUND OF THE STATE—APPROPRIATION—TREASURER—INVALID LAW—MONEY COLLECTED UNDER INVALID LAW.
 Fund in the State Treasury consists of moneys received in the State Treasury not specially appropriated by law. The moneys are collected for a certain fund, and paid into the Treasury under an invalid Act of the Legislature, is no reason why such moneys should be credited to the "General Fund." The State Treasurer is not to pay out money received in his official capacity under an unconstitutional law. The intention of the Legislature to exclude such moneys from the "General Fund," does not depend upon the validity of the Act by which such exclusion is manifested. Money received and paid into the State Treasury under a void Act must remain in the Treasury until appropriated to a certain purpose by the Legislature.

Mandamus.

*James A. Waymire and W. H. Sears, for petitioner;
 Attorney-General Hart, for respondent.*

By the COURT:

The petition alleges that there is in the State Treasury a sum of money "collected, received and paid into the Treasury to the credit of certain funds designated by an Act (the Act of April 23, 1880, entitled 'An Act to provide for the drainage of the State Drainage Construction Fund of Drainage District No. 1.'—as claimed by petitioner—the Act of the Legislature is unconstitutional and invalid, we are asked, by writ of mandate, to compel the State Treasurer forthwith to credit the sum aforesaid to the "General Fund."

Section 454 of the Political Code provides: "The General Fund consists of moneys received into the Treasury not specially appropriated." The money which the petitioner asks to have transferred to the "General Fund," is not received by the Treasurer in his official capacity, and he is not responsible for its safe-keeping. He may refuse to pay out of it out upon a demand based upon a statute, good or bad, but invalid because unconstitutional. But it follows that because the Treasurer is not authorized to pay out moneys collected under an invalid statute, as the statute poses mentioned in it, he can be required to pay

purposes. Yet, such is the real object of the present
ation.
the "Act to promote drainage" constituted part of the
ation of this State prior to the adoption of the Political
or had been enacted at the same time, it would seem
clear that Section 454 of the Code did not require that
moneys collected under the "Drainage Act" should be
l to the credit of the "General Fund." In the case
sed Section 454 would be read as if it had declared—
General Fund consists of moneys received into the
ary and not specially appropriated by the Act 'to pro-
drainage,' etc. In arriving at the intention of the
ature sought to be expressed in the section, the cir-
umstance that the "Drainage Act" was unconstitutional,
not, in such case, be material. The purpose of the
ature to exclude from the "General Fund" the moneys
ted under the "Drainage Act" would be equally
ent, whether the latter Act was or was not a constitu-
or valid statute. The "Drainage Act," so called, was
assed until after the Political Code, but Section 454
tly contemplates the exclusion from the General Fund
neys specially appropriated by subsequent Acts of the
ature. The Legislature, by formal Act, did specially
riate the moneys collected under the "Act to promote
ge." The "Drainage Act" may be invalid, but this
not change the intention expressed in Section 454 of
olitical Code, which is to include in the General Fund
ne moneys which may not be specially appropriated by
claration of the Legislature. If the "Drainage Act"
d, the moneys collected under it must remain in the
ary until appropriated by an Act of the Legislature re-
g that they be returned to the taxpayers, or otherwise
riating them. It may be admitted that the Legislature
e power to appropriate to the payment of the general
litures of the Government moneys collected and
ted to be appropriated under a statute absolutely void,
t every principle of sound construction requires of us
d that such was not the intention of the legislative body,
the language employed clearly demands that such in-
a be imputed. In our opinion the language of Section
es not make necessary a construction such as must
opose a certain element of injustice, even if the moneys
strict law, be assumed to have been paid by the tax-
voluntarily. The section ought not to be held to
a residuary fund into which shall lapse all moneys
the Legislature may have attempted ineffectually to

appropriate to some special purpose. It simply the General Fund such moneys received into the Treasury as have not by formal legislative enactment or invalid) been declared to be appropriated special Writ denied and proceeding dismissed.

DEPARTMENT No. 2.

[Filed May 7, 1881.]

No. 6720.

O'NEIL, RESPONDENT, vs. DONAHUE, APPELLANT.

GIFT—TITLE—PRACTICE—EVIDENCE—COSTS—NOTICE. Defendant certain shares of stock of a company of which he (defendant) President, for the purpose of qualifying A as Director of the company. A knew the object, and that the stock was expected to be delivered to him. The shares were found in the safe of the company after the death of A, but there was no evidence that a delivery of the shares had been made to defendant. *Held*, that the legal title was in A at his death, and passed to plaintiff as his administratrix. A finding of fact that the shares were disturbed if there is evidence to support it. Actual notice rendering of a decision is the equivalent of written notice. Time for filing a memorandum of costs run from the time of actual notice.

Appeal from Nineteenth District Court, San Francisco.

G. W. Tyler, for respondent.

Lloyd & Newlands, for appellant.

THORNTON, J., delivered the opinion of the Court.

This action was brought to recover damages for conversion of forty-five shares of the capital stock of the Omnibus Railroad Company.

The cause was tried by the Court, and judgment was given for plaintiff. Defendant moved for a new trial which was denied, and this appeal is from the judgment and order denying a new trial.

The Court below rendered its decision as follows:

"This cause was tried by the Court, sitting without a jury, and the Court finds as follows:

"AS TO THE FACTS.

"First—James O'Neil died September 5, 1876, and was appointed and duly qualified as administratrix of his estate on the 17th day of October, 1876, and has since continued to act as such.

"Second—O'Neil, for ten years prior to his death, had

confidential clerk of defendant, and until his death collected large sums of money and made large disbursements for and had the custody and control of his private papers, defendant's agent in all his business affairs, and was vitally trusted in all respects.

Third—Defendant, for ten years prior to O'Neil's death, president of the Omnibus Railroad Company, a corporation having its office in San Francisco, and was a large holder therein. Said O'Neil was Secretary of said corporation during that time, as well as confidential clerk of defendant.

Fourth—Said defendant, during said period, at various times bought and sold a great many shares of said stock, O'Neil acting as his agent in said transactions, and a large number of said shares were transferred to said O'Neil on the books of said company, and afterwards to defendant—in all about one hundred shares.

Fifth—The by-laws of said corporation provide that each shareholder must be the *bona fide* owner of fifty shares of stock, and own in his own right.

Sixth—In 1866 said Donahue gave to said O'Neil and transferred to him on the books of said corporation fifty shares of stock, with intent to qualify said O'Neil as a director in said corporation. Said stock was afterwards, as occasion required, transferred with other stock to defendant as security for money loaned to defendant, said O'Neil acting as agent in said transaction. Said stock was again conveyed to said O'Neil, and the same of forty-four shares, hereinafter mentioned, constitutes part of said stock. There was no agreement that said stock would be conveyed back to defendant, but said O'Neil knew the purpose of such transfer, and also that said Donahue, as the owner of much stock in many corporations, was in the habit of transferring stock to various persons to enable such persons to act as directors in such corporations, and such persons were required after the stock was issued to assign the same in blank, and deliver the same to the corporation, and such was the unexpressed expectation of both parties in the said transfer to O'Neil.

Seventh—Said O'Neil, as clerk and agent of defendant, had the custody of the safe containing the private papers of defendant, and as Secretary of the Omnibus Railroad Company had custody of the safe of said corporation. Said Donahue had no access to either of said safes except by the aid of said O'Neil.

Eighth—Said O'Neil died suddenly, without any premoni-

tory sickness. After his death there was found in the safe of defendant a portfolio or wallet, in which the defendant kept his private papers, such as notes and certificates of stock, and in this was a certificate for fifty shares of stock in the Omnibus Railroad Company, which was one of the books of said corporation stood in the name of the defendant, indorsed on which certificate was a blank assignment made by said O'Neil. In said safe was a separate portfolio of papers belonging to said O'Neil, but containing no certificates of stock in said corporation. In the safe of the corporation the defendant found a certificate for forty-four shares of stock in said corporation, issued to said James O'Neil and indorsed to him in the manner above stated as to the certificate of stock in his private safe, and placed in an envelope, across which was written the name of the defendant.

"Ninth—Said forty-four shares given to said O'Neil before stated, had stood in his name since 1868, and in consequence said O'Neil had acted as a director at the request of the defendant. That said indorsement was made in consequence of the expectation of Donahue that it would be given back, but said certificate was never delivered to the defendant unless the above facts constitute a delivery. In consequence of said indorsement said O'Neil continued to exercise the rights of a stockholder in said corporation, with the exception of the edge of said Donahue, by virtue of said stock standing in the books of the corporation in his name, acting as a director, drawing dividends, and receipting on the books of the corporation in his own name as the owner of said stock. Said O'Neil also drew the dividends of defendant in said corporation, and from many other corporations in which the defendant was a stockholder, receipting for the same.

"Tenth—Inferentially, from the above facts, the court held that the defendant gave said stock to O'Neil, intending that the same should vest absolutely in said O'Neil to use as he saw fit to be a director, believing, however, that said O'Neil would turn the same when requested. That the indorsement was made to enable Donahue to obtain said stock in case of his death, but the same was never actually returned or given back to the defendant by O'Neil.

"Eleventh—Said stock was the property of said Donahue at the time of his death.

"Twelfth—Plaintiff made due demand of defendant for said stock on the 24th day of April, A. D. 1877, which demand was refused.

"Thirteenth—Said defendant converted said stock to his own use on the 24th day of April, 1877.

fourteenth—The value of said stock at the time of said decision was eleven hundred dollars. As matter of law the court finds that plaintiff is entitled to judgment against defendant for the sum of eleven hundred dollars, with interest from the 24th day of April, A. D. 1877, as damages for the conversion of stock, with her costs. So

it was contended by the appellant (defendant below) that upon review of the judgment the judgment should be reversed, and judgment rendered for defendant.

The court have examined the findings carefully, and are of opinion that they support the judgment. The facts found showed that title to the stock vested in the intestate of plaintiff, and that this title never passed out of him; that plaintiff's father owned the shares at his death, and they passed to plaintiff afterwards, as his administratrix, as part of his

estate. It was further contended that the evidence is insufficient to support the decision; that the evidence shows that the stock was given to the defendant by plaintiff's intestate, and that the title was perfected by delivery. The decision of this court is based upon matters of fact, peculiarly proper for the jury to decide below to decide. The Court found that the stock was never given to Donahue as urged, and we will not disturb such finding if there is any evidence to support it.

We have examined the testimony as set forth in the transcript, and find that there is evidence to support the decision on the other findings of fact.

It was urged on the view most favorable to the defendant, the evidence is conflicting as to the gift back to Donahue, and, under the circumstances, the finding, according to the long settled rule of this Court, will not be disturbed. We will add here that the evidence as to the gift by defendant to O'Neil is clear and conclusive.

The defendant moved the Court to strike out and disallow the plaintiff's memorandum of costs and disbursements, on the ground that it was never served on defendant, and that it was not filed within the time allowed by law. He also moved to set aside the memorandum of costs, and each and every item of costs on the ground that the items of costs were excessive, unnecessary by law, and had not been necessarily incurred in the prosecution of the case.

The motion (for there was but one) was denied, and from the denial the defendant appealed.

It was shown by the bill of exceptions that, on the hearing of the motion, it was made to appear that the cause was de-

oided by the Court on the eleventh day of October, that on the same day plaintiff's attorney gave notice of the decision of the Court to the defendant, which notice, on the day just mentioned, was filed in Court on the same day; that on the twenty-first day of October defendant gave notice to plaintiff of his intention to move for a new trial.

At the time of the occurrence of the foregoing facts, it was required by Section 1033, C. C. P., that "the party whose favor judgment is rendered, and who claims costs, must deliver to the Clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the Court or referee—or if the entry of the judgment is stayed, then before such entry—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, with a statement of the same, and the same must be verified," etc., etc.

As we have stated, the cause was tried by the Court, and the decision was in favor of plaintiff. The defendant gave no notice of such decision to the plaintiff, but she did give such notice to the defendant, and that on the same day that such decision was made. This notice was not given by plaintiff to impose on defendant the obligation to give notice of his intention to move for a new trial under Section 659, C. C. P., and within the time prescribed therein, if he intend to do so. The object of the provisions of Section 1033, as to the costs, was to give the successful party a claim for such costs, five days after he had knowledge of the verdict or decision to file and serve his memorandum of costs. The successful party had knowledge of such decision at all doubt, as she did in this case, why require her to serve notice of that fact on her? It clearly appears that she did have such knowledge, for she, by her attorney, gave a notice of the decision on the defendant on the eleventh day of October, 1878. Still, with this knowledge, the memorandum was not filed until the thirteenth day of January, 1879—more than ninety days after she had knowledge of such decision.

We are of opinion that the memorandum was filed late, and that it should have been stricken out by the Court below.

The judgment and order denying the motion for a new trial are affirmed, and the order as to the memorandum is reversed, and the cause remanded, with a direction to the Court below to strike out said memorandum.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed May 6, 1881.]

No. 7616.

STOCK QUICKSILVER MINING COMPANY,
 PETITIONER,
 VS.
 SUPERIOR COURT OF SANTA CRUZ COUNTY,
 RESPONDENT.

PROCEEDINGS IN DIFFERENT COUNTIES—JUDGMENT—PRACTICE. If a case is tried in one county, and the Judge prepares findings in another, and transmits them to the county in which the case was tried, to be filed by the Clerk of the Court of the latter county, the judgment is not void. A cause tried by the Court is not determined until the findings and order for judgment are filed with the Clerk of the Court in which the action was tried. A Judge is not bound to deliberate upon or prepare findings and order judgment in the county in which an action is tried.

iorari.

um, for petitioner.

ey, contra.

PFSTEIN, J., delivered the opinion of the Court:

material facts in this case may be briefly stated as follows: The Judge of the Superior Court of Santa Cruz County, being disqualified to try an action then pending in that court, wherein the above mentioned petitioner was defendant, got the Judge of Monterey County to sit in said court, or Court of Santa Cruz County, for the purpose of trying and determining said action. The latter sat and tried the cause in the Superior Court of Santa Cruz County, where the same was tried and submitted, took it under advisement. He then returned to his own county of Monterey and there prepared and signed findings of fact and conclusions of law, and ordered judgment to be entered against the petitioner. Said findings and order were submitted to the Clerk of the Superior Court of Santa Cruz County, who duly filed them and entered judgment accordingly. These proceedings are brought here upon a writ of habeas corpus, and this Court is asked to annul the judgment, on the ground that the Judge who signed the findings and entered the judgment to be entered did so at Monterey instead of Santa Cruz County, which renders the proceedings void for want of jurisdiction.

The jurisdiction of the Court to hear and determine the case is not doubted, but it is claimed that the determination should have been in the county in which the action was pending. This may and must be considered so; but the cause was not determined until the findings and order for judgment were filed with the Clerk of the Superior Court of Santa Cruz County. It was not the Court's duty to determine the case until the findings and order for judgment were filed, but the filing of the findings and order for judgment determined the action. We are quite confident that there is no law that requires a Judge to deliberate upon a case until he has prepared his findings and order for judgment in the county in which the cause is pending. If there is not, the proceedings of the Court below should be affirmed and writ dismissed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7659.

BUELL, APPELLANT, VS. DODGE ET AL., RESPONDENTS.

PRACTICE—CHANGE OF VENUE—AMENDED COMPLAINT. The right of a defendant to a change of the place of trial is to be determined by the facts set forth in complaint as originally filed, and not by the facts set forth in an amended complaint subsequently filed.

Appeal from Superior Court, Santa Barbara County.

W. C. Stratton, for appellant.

Fernald, Pillsbury & Titus, for respondents.

By the COURT:

The demand that the trial be held in San Francisco was made by the defendants when they demurred to the original complaint; by which complaint it appeared that the defendant Dodge (a resident of San Francisco) was the only defendant against whom the facts alleged warranted a judgment.

Dodge's right to a change of the place of trial was determined by the then conditions of the case, and cannot be taken away by statements in an amended complaint subsequently filed.

Order affirmed.

DEPARTMENT No. 2.

[Filed May 14, 1881.]

. No. 7481.

ROYON AND WIFE, RESPONDENTS,

VS.

GUILLEE AND WIFE, APPELLANTS.

COMPLAINT—FINDINGS—PRACTICE. To an action brought by plaintiffs money lent defendants jointly, a cross-complaint was filed, setting out that one of the plaintiffs, by undue influence, obtained from one of the defendants an instrument in writing for the payment of money, and asked that it be adjudged void, and plaintiffs enjoined from enforcing it: *Held*, that a finding on the subject was unnecessary, it not appearing that plaintiffs sought to recover on the instrument, or that the same was introduced in evidence. If there is no issue joined on a cross-complaint, a finding is not necessary.

from Nineteenth District Court of San Francisco.

Smith & Son, for appellant.

Swain, for respondents.

COURT:

action was brought to recover money alleged to have been lent by the plaintiffs jointly to the defendants jointly. Defendants denied all the material allegations of the complaint, and, by way of cross-complaint, alleged that one of the defendants lent to one of the plaintiffs sums of money; that one of the plaintiffs obtained, by undue influence, from one of the defendants an instrument in writing for the payment of certain moneys, which the defendants asked to be adjudged void, and to have plaintiffs enjoined from enforcing it. The findings are full upon all the issues raised by the complaint and answer, but there are no findings as to the allegations of the cross-complaint, which were not answered by the plaintiffs.

The only question is whether the allegations of the cross-complaint are sufficient to entitle defendants to any relief in the action. The transaction to which it refers is alleged to have taken place between one of the plaintiffs and one of the defendants only; and it does not appear from the complaint that the plaintiffs sought to recover upon the instrument referred to in the cross-complaint. We have nothing but the complaint and answer before us, and there is nothing to show that the instrument was introduced in evidence. It is therefore unnecessary for us to see that the allegations of the cross-complaint, with respect to said instrument, were at all rele-

vant to the case, and therefore no answer to the required; and, there being no issue upon it, no further necessary.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed May 11, 1881.]

No. 6637.

FISH ET AL., APPELLANTS,
VS.
FOWLIE ET AL., RESPONDENTS.

EQUITABLE TITLE SUBJECT TO EXECUTION SALE—DECREE.
interest in real property is subject to levy and sale under a writ of execution. *Held*, accordingly, that the right of a party under a purchase real estate is subject to execution sale, and that the party such sale is entitled, upon the payment of the unpaid purchase price to a conveyance of the legal title. A acquired, upon the sale, all the right, title and interest of B in and to a contract of real property. Subsequently defendants succeeded in obtaining the owner of the legal title conveyed it. Defendants plaintiffs; the latter brought a suit of foreclosure, intervened: *Held*, that the defendants should be allowed to complete the purchase under the contract of the intervenor should pay such amount into Court for their satisfaction of the mortgage debt to plaintiffs; that if the mortgage be canceled, the intervenor awarded plaintiffs decreed entitled to a money judgment over defendants for any balance remaining due upon the mortgage, otherwise that plaintiffs be entitled to a decree of foreclosure against defendants and intervenor.

Appeal from Twelfth District Court, San Francisco.

Robert Ash, for appellants.

James McCabe, for respondents.

McKEE, J., delivered the opinion of the Court.

This case arises out of an action brought by the defendants to foreclose a mortgage upon the land in controversy by the defendants to secure payment of a promissory note due by them to the plaintiffs.

After the filing of an answer the defendants took their part in the proceedings of the case; but before the trial one Seculovich, claiming the mortgaged premises, intervened as both plaintiffs and defendants, intervened in the case and in his complaint of intervention alleged that he was the owner of the land at the date of the execution of the mortgage.

that the mortgagors had then no title or interest in it; the mortgage was fraudulent and void, and created no title in the land which was foreclosable, and he asked that the judgment be set aside and annulled as a cloud upon his title. All objections of the intervenor's complaint were denied by the court in the action. Upon a trial of the issues made between the plaintiffs and the intervenor the Court below rendered judgment in favor of the latter, and from the judgment the intervenor is now appealing, denying a new trial comes this appeal.

The mortgage was executed and recorded on the thirteenth day of December, 1876. At that date the intervenor claims that he was the owner of the land, by a compulsory sale and deed, under a levy made upon the land by an execution issued upon a judgment against the defendant George. The judgment was rendered on the twenty-fourth day of July, 1876. Execution was issued thereon, and levied upon the land on the seventh day of August, 1876; and the Sheriff's sale under the levy, at which the intervenor purchased the land, was made on the eighth day of February, 1876. No redemption having been made by the defendant, the Sheriff, on the first day of September, 1876, conveyed the premises by deed to the intervenor.

The deed was "upon all the right, title and interest which George Fowlie had in and to the land on the twenty-seventh day of July, 1876, and thereafter."

Words "real property" are co-extensive with lands, tenements and hereditaments. (Sub. 5, Sec. 14, C. C.) The word "interest" embraces all titles, legal or equitable, perfect or imperfect. (*Leese vs. Clark*, 20 Cal. 387), including such as are created by contract—those which are executory as well as those which are executed. (*Soulard vs. United States*, 4 Cal. 11.) Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale. (C. C. P. § 688; *Kennedy vs. Nunan*, 52 Cal. 330; *Dunkerly*, 54 Id. 460.) As a purchaser at the Sheriff's sale, the intervenor, therefore, became substituted in the place of the debtor, and acquired all the right, title, interest and claim which the debtor, George Fowlie, had in the land on the twenty-seventh day of January, 1876, the date of the levy (Sec. 14, C. C. P.), and he was the owner of that interest when the defendant mortgaged the land to the plaintiffs. But it is claimed that Fowlie had no interest at the time of the sale which passed by the Sheriff's sale and deed to the intervenor. Fowlie had not the legal title to the land; he had nothing more than an interest derivable under a contract made on the fifteenth of June, 1875, between the defendant and one W. J. Gunn, who was the legal owner. By

that contract Gunn contracted to convey the land to his heirs or assigns," upon payment of a balance of purchase money, "on or before the fifteenth of September." No personal obligation was given by Fowlie for the purchase money, and it does not appear that he obtained possession under the contract, or that he was in possession at the time of the levy or sale; yet he was to purchase the property, and had paid part of the money and covenanted to pay the balance at a certain time; and he thus became vested with such an interest in the land as was the subject of sale on his part, himself, or of appropriation by execution, or in the mode prescribed by law, by his creditors. The land being vendible by the judgment debtor and liable to attachment or judgment creditors, was all that was sold at sale and deed under the judgment against him. As owner of the interest thus acquired, the intervenor offered to pay Gunn the unpaid balance of the money due upon the contract, and demanded the deed of the land. Gunn, however, refused to accept the money or to make the deed, but on September 13, 1876, execution of his contract, conveyed the land to Fish and Maggie Fowlie—the one being the wife of the plaintiff, and the other the wife of George Fowlie, one of the defendants in this action. Tender of the money in demand for the deed were also made to them by the intervenor, but both the money and the deed were refused afterwards—on December 13, 1876—the land was sold by Mrs. Fish and her husband to the defendants, and on the same day, mortgaged it to the plaintiffs as security for the debt which they owed.

Upon the tender of the money to Gunn, the intervenor became the successor in interest of Fowlie under the contract, and became entitled to a conveyance of the land; and it was the duty of Gunn to execute and deliver to him a deed in conformity with the demand made for it. The refusal of Gunn to perform his duty did not impair the intervenor's right, nor relieve the defendants from the obligation to convey. The land passed with the land to the holders of the legal title, who held it as trustees for the intervenor. Therefore, the defendants received the legal title by the deed of their grantors, and the plaintiffs acquired the equitable title by the deed they took with notice of the equitable right of the intervenor, because his title was of record, and they knew of it. Therefore, they were bound to convey it to him upon

urchase money. As owner of such an equity, the intervenor was therefore entitled to a deed from the defendants and a cancellation of the mortgage upon offering to pay the money due, according to the terms of the contract of

by the complaint of intervention no such offer was made to the defendants or the plaintiffs in the action to foreclose the mortgage. The intervenor, in his complaint, takes issue upon that he was the absolute owner in fee of the land; that the mortgagors had no mortgageable interest in it, and that the mortgage was a fraud and cloud upon his title. But at the time of the execution of the mortgage he was *not* the owner in fee. The defendants were holders of the legal title, and in their hands the title was the subject of mortgage or lien. The mortgage to the plaintiffs was, therefore, a valid and operative lien upon the land to the extent of the interest in which the mortgagors acquired by their conveyances to Gunn; and the plaintiffs have a right to foreclose the mortgage as against the interest of the mortgagors—subject, however, to the right of the intervenor, on payment of the money due upon the contract of purchase, to a conveyance of the legal title freed of the lien of the mortgage. Intervenor alleges that the money which was tendered to Gunn since the date of the tender, “been kept and held by him in readiness to be paid to Gunn or Fowlie, or to the person entitled thereto, interest as well as principal; and that he is now ready to pay the same to said Gunn or said Fowlie, or to whom the Court may direct.”

In the case as presented to the lower Court upon the facts and evidence, we think the Court erred in cancelling the plaintiffs’ mortgage. It should have ascertained the amount of the principal and interest due to the defendants at the time of purchase money paid under the contract of sale, and ordered the intervenor to pay the amount into Court immediately, or at a time fixed for that purpose, to be applied to the payment of the mortgage debt; and that, upon such payment being made, the mortgage be annulled and canceled, the plaintiffs entitled to a money judgment against the defendants for any balance remaining due upon the mortgage debt. But in case the money was not paid within the time fixed by the order, that the plaintiffs be entitled to the decree of foreclosure against the defendants and the intervenor.

The judgment and order reversed, and cause remanded for a new trial, according to the views expressed in this opinion.
Concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed May 11, 1881.]

No. 6633.

THOMAS vs. MOODY.

EQUITY—AGENCY—FRAUD—NOTICE. A party selecting a person knows to be irresponsible to purchase under his direction his promise to such person to furnish money to pay for innocent third person, and after the goods have been and have come into his hands, retains them or their proceeds refuses to pay for them, will be held responsible to the vendor of the goods. In such case there is sufficient agency to charge the defendant; and this, whether the vendor of the goods knew of any agreement between defendant and the irresponsible party, or knew that the goods were to be delivered to the defendant.

Appeal from Nineteenth District Court, San Francisco.
Sewall and Edgerton, for appellants.
S. S. Wright, for respondent.

Ross, J., delivered the opinion of the Court:

In the year 1869 the firm of Strowbridge & Son was established and engaged in the business of buying and selling wool in their place of business being in the city of San Francisco. From 1869 to about the month of February, 1870, the firm of Farish & Co. was engaged in the business of selling wool on commission at the city of San Francisco, and in the purchase of wool from Strowbridge & Son to be sold on commission. Farish & Co. also made advances to Strowbridge & Son for their wool—the advances being made by means of drafts drawn by the latter on Farish & Co. These drafts were drawn and paid, as Strowbridge & Son wanted to sell their wool, but not with reference to any particular consignments. In or about the month of February, 1870, Farish & Co. failed, and were immediately succeeded in business by the defendant Moody, under the firm name of Farish & Co. Farish, who has ever since continued in the same business at the place theretofore occupied by Farish & Co., the defendant thus succeeded to the business of Farish & Co., he entered into an agreement with Strowbridge & Son to transact business with them upon the same terms and in the same manner that Farish & Co. had done, and he dealt with them until about the first day of September, 1870. At the time last mentioned the defendant ascertained that Strowbridge & Son had become indebted to him, by reason of their dealings with him, in an amount exceeding the advances made by him to them.

dollars; and becoming dissatisfied and ascertaining he thereupon entered into a new arrangement with Strowbridge & Son, by which it was agreed that the latter was to go on and buy wool as before; that the defendant was to furnish the money to pay for it; that it was to be paid in drafts drawn by them on him; that such drafts were not to exceed the cost of the wool; that they should deliver to him all the wool bought by them; that the defendant was to sell it, and after deducting the cost of the wool, was to charge thereon for commission, freight, drayage and expenses, and would apply the proceeds of sale to the payment of the indebtedness of Strowbridge & Son to the defendant.

At the time of making this last mentioned agreement, Strowbridge & Son were irresponsible, and had no means to pay for the wools purchased or to be purchased by them, and the defendant knew. And Strowbridge & Son, after the making of said last mentioned agreement, relied solely upon the defendant's promise to furnish the money to pay for the wool bought by them, and would not have made any purchases hereafter but for that promise. Under said last agreement, Strowbridge & Son proceeded to and did buy wool from various persons in the counties of Yolo, Colusa and Sacramento, and continued so to do until on or about the 25th of May, 1873. Among the wools so purchased, they bought, on the 10th of May, 1873, from the plaintiffs, 60½ bales, at the agreed price of \$3,690 in gold coin; on the 22d of May, 1873, from J. P. Lowell, 103 bales and 17 sacks, at the agreed price of \$5,768.64 in gold coin; on the 20th of May, 1873, from H. Cantrell, 13 bales, at the agreed price of \$721 in gold coin; on the 13th of May, 1873, of P. O'Brien, 41 bales, at the agreed price of \$2,559.69 in gold coin; and on the 10th of May, 1873, of Charles C. Hubbard, 38 bales, at the agreed price of \$2,209.56 in gold coin. By the terms of said sale agreement the purchase price was due and payable on the delivery of the wool to Strowbridge & Son. All of the wool so sold was, on the 25th day of May, 1873, delivered by the sellers to Strowbridge & Son, and by them to the defendant. After the purchase by Strowbridge & Son of any of this wool after the making of the last agreement between the defendant, the latter frequently wrote them letters, and gave them directions and instructions as to what wool they should purchase, and the price they should pay for it, and also directing them to send him the bills of lading and shipping receipts for the wool, and to consign it to Strowbridge & Son. Strowbridge & Son notified the defendant of the sale of the wool in question, as well as of all other

purchases of wool made by them, as soon as they were made; and after the receipt of the wool by the Strowbridge & Son exercised no control over the same was managed and disposed of by the defendant's discretion, without any interference on the part of the Strowbridge & Son.

Prior to the commencement of this action, the defendant sold all of the wool in question, and after deducting the expenses of sale, including his commissions for the sale, credited the balance of the proceeds (with the exception of the two payments hereinafter mentioned) to the Strowbridge & Son on account of their indebtedness to him, and applied the same to his (defendant's) own use.

Neither plaintiffs nor Lowell nor Hubbard have paid anything for or on account of the wool sold, but Cantrell was paid \$121 on account of his, and Lowell was paid \$1,559.69 on account. Before the institution of this action, the plaintiffs succeeded, by assignment, in obtaining the rights of Lowell, Cantrell, O'Brien and Hubbard in the premises.

In making the respective sales of the wool in question, the plaintiffs and their assignors gave credit solely to the Strowbridge & Son, and did not rely upon the defendant's payment of the purchase money. Indeed, it does not appear that at the time of sale any of the sellers knew that the defendant had any connection with the transactions. The Strowbridge & Son drew drafts on the defendant for the amount due for the wool, which drafts the defendant, in 1873, dishonored, and therefore Strowbridge & Son's claim is suspended.

On these facts, all of which appear from the judgment, it is plain that the plaintiffs are entitled to judgment. No man can select another, whom he knows to be insolvent, to purchase, under his directions and promise to furnish the money to pay for them, the goods of innocent third persons, and then, after the goods have been so purchased and have come into his hands, can refuse to pay for their proceeds, and at the same time refuse to refund the money, is a proposition which can no more be justified in law than in morals.

In this case the defendant authorized Strowbridge & Son to buy the wool of the plaintiffs and their assignors, expressly agreeing to furnish the money to pay for the same, that Strowbridge & Son were irresponsible, and that they were to pay for the wool. They, of course, knew that the wool, and, to their credit be it said, would not have

defendant's promise to furnish the money with which to buy it. Defendant instructed them what wool to buy, at what price. He directed them to consign it to him, and he received it, he managed and disposed of it at his own, without any interference on their part.

The facts constituted an agency sufficient to charge the defendant. It is true that neither the plaintiffs, nor any of the assignors, knew anything of any of these circumstances of selling the wool. They did not know the defendant in the matter at all, but supposed they were dealing with Strowbridge & Son alone. But that does not exempt the defendant from liability. (*Raymond vs. C. and E. Mills*, 24; Story on Agency, 291; 2 Smith's Leading Cases, 58.) Nor does the fact that the defendant credited Strowbridge & Son's indebtedness to him with the amount of the proceeds of the wool affect the question, for the reason, among others, that he had no right, even under the terms of the agreement between himself and them, to do any such thing. By the express terms of that agreement he was to furnish the money to pay for the wool. It was to be sent to him, he was to sell it; and, after deducting the cost of the wool and all charges thereon for commission, freight, drayage and storage, was to apply the proceeds to the payment of the indebtedness of Strowbridge & Son. Instead of complying with this agreement, he sold the wool, deducted from the proceeds of sale his commissions and the other expenses, and then credited the balance, including the cost of the wool, on the indebtedness of Strowbridge & Son, and kept the whole of it in his pocket.

It comes the right of the defendant to make the payment of the plaintiffs and their assignors pay the debt of Strowbridge & Son? Certainly not by reason of the contract between himself and them; certainly not in morals, and equally certain that it does not exist in law. As the law stands, not only has the defendant got the property of the plaintiffs without its having been paid for, but he succeeded in obtaining it by procuring Strowbridge & Son, whom he knew to be wholly irresponsible, to buy it, upon his promise to furnish the money with which to pay for it, thus magnified the fraud by which he seeks to reap the benefit of the plaintiffs' property by making Strowbridge & Son the innocent instruments in its perpetration. Defendant must not thus take advantage of his own wrong. (*Hill vs. Taunt*, 275.)

The judgment reversed, and cause remanded to the Court before for further directions to enter judgment on the findings in

favor of the plaintiffs and against the defendant for of thirteen thousand two hundred and sixty-eight ty-hundredths dollars, in United States gold coin, interest thereon in like gold coin, from the first day 1873, and for costs of suit.

We concur: McKee, J., McKinstry, J.

IN BANK.

[Filed May 20, 1881.]

No. 7697.

SAN JOSE GAS COMPANY, APPELLANT
VS.

JANUARY, TREASURER, ETC., RESPONDENT

ASSESSMENT—FRANCHISE—ASSESSOR'S VALUATION—APPEAL TO
EQUALIZATION—COURTS HAVE NO POWER TO REVIEW THE
OF PROPERTY FIXED BY ASSESSORS—INJUNCTION—STREET
franchise of a corporation is taxable property, and its
determined by the Assessor cannot be revised by the
method of arriving at the valuation of taxable proper
Assessor to determine. If he errs in his judgment the
application to the Board of Equalization for relief. It
not lie to restrain the collection of a tax, portion of w
where plaintiff has not paid such portion. In determin
of street mains, owned by a gas company, the Assessor a
cost of digging trenches, laying pipes, making connecti
added the same to the estimated cash value of the m
proper, as the mains so laid in the ground for the purpo
they were used were of more value than if they were no
estimating the value of plaintiff's franchise the Asses
the combined aggregate market value of the shares o
stock of the corporation owned by shareholders, and fro
gate deducted the combined aggregate value of all the
erty of the corporation, including real estate and improvem
personal property, money, and street mains: *Held*, prop

Appeal from Superior Court of Santa Clara Co

McKisick & Rankin and Quilty, for appellant.

J. H. Campbell, for respondent.

MYRICK, J., delivered the opinion of the Court:

The appeal in this case was taken from an order
a temporary injunction and from a judgment o
plaintiff's complaint. The demurrer of defendan
tiff's complaint having been sustained and judgmen
upon plaintiff declining to answer. The case is,
to be considered as the same is presented by plain
complaint, which, in brief, is this:

ntiff is and was on the 10th of March, 1880, a corpo-
engaged in the manufacture and selling of gas to the
and inhabitants of San Jose and to the town of Santa
and adjacent places in Santa Clara County. Its capital
was \$600,000, divided into 6,000 shares, which were
by stockholders and not by the corporation. The
ation owned taxable property in Santa Clara County,
Real estate and improvements, personal property,
street mains, franchise. In due time the corporation
with the Assessor a statement of all property, including
street mains and franchise. The complaint alleges that
all cash value of the street mains, that is to say, the
pipes in the ground, was \$15,000 and no more, and that
assessor assessed the street mains at \$40,860; that in
g the assessment he added to the full cash value of the
mains the cost, estimated by himself, of digging the
pipes, laying the mains, pipes, etc., and making the con-
nections, and thus made up an aggregate value of \$40,860.
The complaint also alleges "the full cash value of the plain-
franchise to be a corporation" to be \$100 and no more;
the Assessor assessed the franchise of plaintiff at
\$100, in making which valuation he estimated the com-
aggregate market value of the shares of the capital
of the corporation, held and owned by the shareholders,
\$600,000, and from that aggregate deducted the combined
cash value of all the taxable property of the corpora-
tion including real estate and improvements thereon, per-
sonal property, money and street mains, and found the
value at \$130,000, and assessed the franchise at that sum. The
plaintiff made application to the Board of Equalization of
Santa Clara County claiming a reduction of the assessment on its
street mains from \$40,860 to \$15,000, and on its franchise
from \$130,000 to \$100. The Board examined the application,
examined on oath the officers of the plaintiff and the
assessor. From such examination it appeared to the Board
that the valuations placed upon said street mains and fran-
chise were made in the manner hereinbefore stated and not
otherwise; and the Board being of opinion that the street
mains and franchise had been correctly assessed, rejected the
application and refused to reduce either of the valua-
tions. The tax on the street mains at the valuation of
\$40,860 is \$612.90; at a valuation of \$15,000 would be \$225;
the franchise at \$130,000 is \$1,950; at \$100 would be \$1.50;
plaintiff tendered payment of \$255 and \$1.50, receipt
for which was refused. Plaintiff prayed for an injunction
against defendant from proceeding to enforce the col-

lection of the taxes upon the valuation as f
Assessor.

1. As to the valuation of the mains:

The duty of making the valuation was ca
Assessor. The method of arriving at the va
process by which his mind reached the conclus
where, as here, it is not pretended that he acted
or dishonestly), is matter committed to his de
In fixing a valuation upon the mains, it was e
petent for him to take into consideration the c
mated by himself, of digging the trenches, layin
and making the connections. It was competen
determine that mains laid in the ground were of
as so laid, for the purposes for which they we
would be the pipes in the warehouse of the dea
would be the crude iron at the foundry. If he
judgment, the remedy was by application to th
Equalization, and the Courts will not revise th
of these officers upon such questions.

This disposes of the case, because the tax upon
valuation of the mains was not paid nor offered
If any part of the tax complained of be legal, th
be paid before a party will be heard to complain
portion.

2. The appellant argues, that under Section
XI, of the Constitution, a franchise for using pu
and laying pipes for supplying a city with gas an
no value. A sufficient answer to that is, the appe
(which it could not deny), that the right of layin
maintaining pipes in the streets of a city, by mea
gas or water is to be conveyed, is a franchise; and
I, Article XIII, of the Constitution, franchises
to be property for the purposes of taxation. Th
assessment, and by whom, was to be and was p
by law. Therefore, it does not rest with the pla
the Courts to determine that its franchise had n
a pecuniary sense the value of franchises may b
as the objects for which they exist and the metho
they are employed, and may change with every
time; but that franchises are property and are to
some method in proportion to value, is a part
mount law of this State.

Judgment and order affirmed.

We concur: Sharpstein, J., Ross, J., Thornton
J., Morrison, C. J.

I concur in the judgment upon the ground first
Mr. Justice Myrick: McKinstry, J.

Pacific Coast Law Journal.

VII.

JUNE 4, 1881.

No. 15.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed May 16, 1881.]

No. 7707.

ELLER ET AL., RESPONDENTS, VS. SUCH, APPELLANT.

JURISDICTION—PROBATE JURISDICTION—PARTNERSHIP—ACCOUNT—TRUST—EXECUTOR. A Court of equity has complete jurisdiction of the claims of creditors against separate partnerships of which a decedent was a surviving member. In such case the Probate Court has not jurisdiction, the surviving member leaving no individual property, because it cannot determine conflicting claims between partnerships, nor settle disputed accounts between the several partnerships. The rights of the representatives or successors of several partnerships can only be determined by a Court of equity. Assets, debts and credits of a partnership do not become confused with the estate of the surviving partner, but remain separate and distinct. Property held in trust by a surviving partner, to be applied to partnership purposes, is a special fund, which passes to his executor, subject to be applied to the same purposes for which the testator held it. A partnership is dissolved by the death of one of its members.

Appeal from Superior Court, San Francisco.

Charles Page, for appellant.

Wm. Stoney & Hayes, for respondents.

KINSTY, J., delivered the opinion of the Court:

Case was submitted in the Court below upon the statement following:

Whereas, a certain controversy has arisen and exists between the above named plaintiffs and the above named defendant, and in such controversy the question in difference that might be the subject of a civil action, of which action, had it been brought, this Court would have jurisdiction.

And whereas, the said plaintiffs and said defendant, to settle that said controversy may be speedily and finally decided and ended, have agreed to submit said controversy to this Court.

"Now said parties have agreed, and hereby do the following case, which contains the facts upon controversy depends—viz.:

"That for several years prior to the twenty-first day of August, 1855, a commercial co-partnership existed between F. L. A. Pioche, J. B. Bayerque and Samuel Moss, under the firm name and style of 'Pioche, Bayerque & Co.'; that said Moss died on or about the twenty-first day of August, 1855; that at the time of the death of said Moss the said partnership was seized and possessed of a large amount of real and personal property, situate in the State of California, and were largely indebted; that portions of the real and personal property belonging to said co-partnership stood of record in the name of each of said co-partners; that that part thereof which stood in the name of the said Moss was under and in pursuance of the orders of the then Probate Court of this county (that Court having jurisdiction of his estate) conveyed by the executors of his estate to the said F. L. A. Pioche and the said Bayerque, in trust for the settlement of said partnership affairs; that thereafter the said F. L. A. Pioche and J. B. Bayerque continued to conduct and carry on the business theretofore conducted by the said partnership under the firm name of Pioche, Bayerque & Co., under the firm name and style of Pioche & Bayerque, until the death of J. B. Bayerque on the twenty-first day of February, 1865, using in the conduct of the business of said last named firm all of the assets and real and personal property of the said firm of Pioche, Bayerque & Co., and continued the affairs of the said firm of Pioche, Bayerque & Co.; that the said J. B. Bayerque died on the twenty-first day of February, 1865, leaving a last will and testament, duly admitted to probate in and by the late Probate Court of the City and County of San Francisco (that Court having jurisdiction of his estate); that at the time of the death of said J. B. Bayerque, a large amount of real and personal property belonging to said firm of Pioche & Bayerque, or Pioche, Bayerque & Co., stood of record in the name of the said J. B. Bayerque, and which was thereafter, under and in pursuance of the order and decree of said Probate Court, duly conveyed by the executors of the estate of the said J. B. Bayerque to F. L. A. Pioche, in trust for the settlement of said co-partnership affairs; that after the death of J. B. Bayerque the said F. L. A. Pioche, the surviving partner of the said firm of Pioche, Bayerque & Co. and Pioche & Bayerque, continued to conduct and carry on the business which had heretofore been conducted by said firms, until his death on the second day of May, 1872, under the firm name and style of

e & Bayerque, and with the capital and assets of said and never settled or adjusted the affairs of either of firms or co-partnerships; that the said F. L. A. Pioche on the second day of May, 1872, in the City and County of San Francisco, where he resided, leaving a last will and testament, which was duly admitted to probate in and by the Probate Court, in and for said city and county, and such proceedings were thereafter duly had; that letters testamentary on the estate of the said F. L. A. Pioche were duly issued to the said Samuel L. Theller, Gustave Dussol and Pierre Touchard, who are now the sole executors of said estate; that, by virtue of their office of executors of said estate, the said F. L. A. Pioche, the plaintiffs took possession and control, and still have possession and control, of a large amount of property, real and personal, situate in this county, that immediately after the qualification of the executors of the estate of the said F. L. A. Pioche, the said executors duly published the statutory notice to the creditors of said estate to present their claims against said estate within the prescribed period, or else the same would be barred; and said period has long since expired; that a large number, aggregating a large amount of claims, were presented to said executors, by persons claiming to be creditors of the said firm of Pioche, Bayerque & Co.; that a large number of other persons claiming to be creditors of the firm of Pioche & Bayerque likewise presented to said executors claims aggregating a large amount; that all of said claims were disallowed by said executors, and more than two hundred suits at law were instituted against them upon each of said classes of claims; those persons so presenting claims arising out of the transactions of the old firm of Pioche, Bayerque & Co. notified said executors that they claimed that all the assets which came to their hands by virtue of their office as executors of the estate of the said F. L. A. Pioche, were the property and assets of the firm of Pioche, Bayerque & Co., and that that part of the same were the assets or property of the firm of Pioche & Bayerque, or of F. L. A. Pioche, and those persons presenting claims arising out of the transactions of the firm of Pioche & Bayerque notified them that they claimed that said properties and assets were the property and assets of the firm of Pioche & Bayerque, and that no part of the same were the property and assets of the firm of Pioche, Bayerque & Co., or of the estate of F. L. A. Pioche; that the executors of the estate of the said F. L. A. Pioche were notified that the heirs of the said Samuel Moss, Jr., claimed that all of said properties and assets were the

property and assets of the said firm of Pioche, B. Co., and that none of the claims presented to the out of the transactions of the firm of Pioche & should be paid therefrom, or out of the proceeds and that they were entitled to all of said property and the said executors were also notified that the heirs of the said J. B. Bayerque claimed that all of said assets and properties were the property and assets of the firm of Bayerque, and none of the claims presented to the out of the transactions of the firm of Pioche, B. Co., should be paid therefrom, or out of the proceeds of. The said executors were also notified that the said and legatees of the said F. L. A. Pioche claimed that the said properties and assets were the assets and properties of the said F. L. A. Pioche, and that none of the claims which had been presented to said executors as arising out of the transactions of the said firms of Pioche, Bayerque or Pioche & Bayerque, were valid, legal or equitable against the estate of the said F. L. A. Pioche.

"That thereupon the said Samuel L. Theller, Dussol and Gustave Touchard, as executors of the last will of the said F. L. A. Pioche, filed their bill in the late District Court of the Twenty-third Judicial District of the State of California, in and for the County of San Francisco, against all persons who presented to them claims arising out of the transactions of the firms of Pioche, Bayerque & Co., or Pioche & Bayerque, against all other persons that they could ascertain, ever, in any manner, creditors of either of said firms, indebtedness to whom they had no evidence had been presented, and against the executor of Samuel Moss, Jr., and all heirs at law and devisees and legatees of the said Samuel Moss, Jr., the said J. B. Bayerque and the said F. L. A. Pioche, requiring said defendants to interplead therein.

"That a true copy of said bill in equity is heretofore filed and marked 'Exhibit A,' and made a part of this agreement.

"That defendants representing all classes of persons claiming any interest in said properties and assets appeared and filed their answers in said suit. That the said suit was, by virtue of the present Constitution of this State, transferred to the Superior Court of the City and County of San Francisco. That all of the parties to said suit were served with the process of said Court, either personally or by publication.

"That all of those persons who had presented claims to the executors of the estate of F. L. A. Pioche claims p

out of the transactions of the said firms of Pioche, & Co., and Pioche & Bayerque, appeared in said and filed answers therein.

That the executor of Samuel Moss, Jr., and the heirs, assigns and devisees of the said Samuel Moss, Jr., the said Bayerque and the said F. L. A. Pioche, severally appeared and answered in said suit.

That the defaults of all of the defendants in said suit did not appear and answer were duly entered therein.

That none of the defendants sued as creditors, whose claims were so entered, ever resided in the United States; and at the time of the commencement of said suit, and the making of said defaults, the plaintiffs had no evidence or information whether said defendants, or any of them, were then alive; and none of them ever presented to plaintiffs any claim against the estate of their testator, or against any property or assets in their hands; but among the defendants who did appear and answer in said action were numerous defendants who held and asserted claims against said property and assets of a character identical in all respects to those supposed to be held, or in fact held by said defaulted defendants.

That, with a few exceptions, the defendants who failed to appear or answer in said action, and whose defaults were entered as aforesaid, were defendants named in subdivision one of the complaint in said action, and were persons to whom the supposed obligations mentioned in said subdivision were originally issued and delivered. That among the defendants who appeared and answered in said action were a number who claimed to be the assignees of, and who were assignments of, the original obligations so issued to said defendants who defaulted; and the number of said original obligations so held by said assignees comprised more than two-thirds, both in number and amount, of the obligations originally issued and delivered to the said defaulted defendants; and said assigned obligations so set up represented the entire obligations so issued and delivered to more than two-thirds of said defaulted defendants.

That thereafter—on the nineteenth day of October, A. D. 1891, upon the written stipulation of all the parties to said action who had appeared therein, a decree was made and entered in said suit, in the words and figures following (so far as the action herein involved is affected thereby), viz.:

In accordance with the stipulation of the parties heretofore made herein, it is hereby by the Court ordered, adjudged and decreed as follows, viz.:

and that for that reason a deed or conveyance plaintiffs made and executed under, by virtue and in pursuance of said decree, and of an order of said Superior Court made and entered in said action, confirming said sale to plaintiffs to said defendant, would not operate to convey title to him.

"That said plaintiffs claim and assert that said Superior Court had jurisdiction over the subject matter of said action, and that said Superior Court had and has jurisdiction over the subject matter of said action, and had jurisdiction to make and enter said decree, and to confirm all sales of real estate made by virtue and in pursuance thereof, and in pursuance of said decree thereto, and that a deed or conveyance made and delivered by them under, by virtue, and in pursuance of said decree and said confirmation, would operate to pass title to the grantee therein named (which conveyance was duly offered to make and deliver to defendant), and that said real estate being held by said F. L. A. Pioche, defendant, during his lifetime, as the surviving partner of said copartnership, and as a trustee for those interested in and entitled to said property and assets of said copartnerships, that said real estate was not and is not subject to administration by said Superior Court, but is being solely within their probate jurisdiction.

"It is therefore agreed that said controversy shall be submitted to this Honorable Court for determination, and that if this Court shall adjudge and determine that said plaintiffs' claims and assertions of the plaintiffs last herein above set forth are correct and true, that this Court shall make and enter judgment and decree in favor of plaintiffs and against defendant, directing and compelling said defendant to specifically perform his said contract with plaintiffs, and to deliver and accept from them such deed or conveyance of said premises offered by them to him, as aforesaid, and to pay to said plaintiffs said sum of twenty thousand dollars at the agreed purchase price of said premises; but if to the contrary, this Court shall adjudge and determine that the said objections so as aforesaid made by defendant to said conveyance are good and valid objections, then said Court shall render its judgment in favor of defendant against plaintiffs, releasing him from all obligation under said contract."

The bill in equity (Exhibit "A") referred to in the foregoing agreed statement is omitted, as its purpose and contents are sufficiently explained in the portions of the statement set forth. The prayer of the bill is:

Therefore, plaintiffs pray that the defendants, and each of them, may be required to appear and answer and interplead herein, in order that said several questions may be adjudicated, and their respective rights in the premises may be adjusted; that if there be any person or persons, now known to these plaintiffs, who are interested in any of the questions herein involved, and who should be made defendants herein, that the rights and interests of said unknown persons may be adjudicated and settled herein, in connection with the rights and interests of those defendants herein, and whose rights and interests are of the same class to which said unknown persons may belong. That it may be decreed, decreed, and determined:

First—What (if any) part or portion of said properties is now in the charge, custody, and control of plaintiffs, and the property and assets of the firm of Pioche, Bayerque & Co.

Second—If any part thereof are assets of said firm of Pioche, Bayerque & Co., whether the estate of Samuel Moss, and his any right, title, or interest therein, and if so, to what extent.

Third—If any part thereof are the assets of said firm of Pioche, Bayerque & Co., whether the said alleged indebtedness of said firm be a legal and valid indebtedness, to be paid out of the proceeds thereof.

Fourth—What part or portion (if any) of said properties are the properties and assets of said firm of Pioche & Bayerque.

Fifth—Whether the said alleged indebtedness of the said firm of Pioche & Bayerque be an existing, legal and valid indebtedness to be paid out of the proceeds of such portion of said properties and estates as may be found to be the properties and assets (if any) of said firm of Pioche & Bayerque.

Sixth—As to what is the construction of the will of the said F. L. A. Pioche, and B. Bayerque.

Seventh—What part or portion (if any) of said properties are the properties and assets of said firm of Pioche & Bayerque, and the estate of the said F. L. A. Pioche; and—

Eighth—Whether any of the said alleged indebtedness of said firm of Pioche, Bayerque & Co., and Pioche & Bayerque, constituted existing legal and valid claims against the estate of the said F. L. A. Pioche, and if so, what portion of the amount thereof.

And that it may be further adjudged and decreed that the defendants as may fail to appear and answer, or

and that for that reason a deed or conveyance plaintiffs made and executed under, by virtue and force of said decree, and of an order of said Superior Court made and entered in said action, confirming said sale to plaintiffs to said defendant, would not operate to transfer title to him.

"That said plaintiffs claim and assert that said Superior Court had jurisdiction over the subject matter of said action, and that said Superior Court had and has jurisdiction of the subject matter of said action, and had jurisdiction to make and enter said decree, and to confirm all sales of real estate made by virtue and in pursuance thereof, and to give judgment thereon, and that a deed or conveyance made and delivered by them under, by virtue, and in pursuance of said decree and said confirmation, would operate to pass title to the grantee therein named (which conveyance was duly offered to make and deliver to defendant), and that the real estate being held by said F. L. A. Pioche, defendant, during his lifetime, as the surviving partner of said copartnership, and as a trustee for those interested in and entitled to the property and assets of said copartnerships, that said real estate was not and is not subject to administration by the probate court, but is held solely within their probate jurisdiction.

"It is therefore agreed that said controversy submitted to this Honorable Court for determination, and that if this Court shall adjudge and determine that the facts and assertions of the plaintiffs last herein above set forth are correct and true, that this Court shall make and enter judgment and decree in favor of plaintiffs and against defendant, directing and compelling said defendant to specifically perform his said contract with plaintiffs, and to deliver and accept from them such deed or conveyance of the premises offered by them to him, as aforesaid, and that he shall pay to said plaintiffs said sum of twenty thousand dollars, the agreed purchase price of said premises; but if to the contrary, this Court shall adjudge and determine that the said objections so as aforesaid made by defendant to said conveyance are good and valid objections, then the Court shall render its judgment in favor of defendant and against plaintiffs, releasing him from all obligation under said contract."

The bill in equity (Exhibit "A") referred to in the foregoing agreed statement is omitted, as its purpose and contents are sufficiently explained in the portions of the statement set forth. The prayer of the bill is:

Therefore, plaintiffs pray that the defendants, and each of them, may be required to appear and answer and interplead herein, in order that said several questions may be decided, and their respective rights in the premises may be adjusted; that if there be any person or persons, now known to these plaintiffs, who are interested in any of the questions herein involved, and who should be made defendants herein, that the rights and interests of said unknown persons may be adjudicated and settled herein, in connection with the rights and interests of those defendants herein and whose rights and interests are of the same class to which said unknown persons may belong. That it may be decreed, decreed, and determined:

First—What (if any) part or portion of said properties is now in the charge, custody, and control of plaintiffs, the property and assets of the firm of Pioche, Bayerque & Co.

Second—If any part thereof are assets of said firm of Pioche, Bayerque & Co., whether the estate of Samuel Moss, has any right, title, or interest therein, and if so, to what extent.

Third—If any part thereof are the assets of said firm of Pioche, Bayerque & Co., whether the said alleged indebtedness of said firm be a legal and valid indebtedness, to be paid out of the proceeds thereof.

Fourth—What part or portion (if any) of said properties and estates are the properties and assets of said firm of Pioche & Bayerque.

Fifth—Whether the said alleged indebtedness of the said firm of Pioche & Bayerque be an existing, legal and valid indebtedness to be paid out of the proceeds of such portion of the properties and estates as may be found to be the properties and assets (if any) of said firm of Pioche & Bayerque.

Sixth—As to what is the construction of the will of the said B. Bayerque.

Seventh—What part or portion (if any) of said properties and estates was the individual property and estate of the said F. L. A. Pioche; and—

Eighth—Whether any of the said alleged indebtedness of said firm of Pioche, Bayerque & Co., and Pioche & Bayerque, constituted existing legal and valid claims against the estate of the said F. L. A. Pioche, and if so, what portion of the amount thereof.

And that it may be further adjudged and decreed that the defendants as may fail to appear and answer, or

interplead herein, have no rights or interest in the and estates in the hands or under the control of pl

"And the plaintiffs further pray that they may h and direction of this Court in the administratio properties and estates, and such other and furth may be proper in the premises."

The Court below, in the case now before us, de

"Now, upon due consideration being had, it Court ordered and adjudged that the agreement b plaintiffs and defendant set forth in said agree specifically performed, and that the plaintiffs e deliver to the defendant a good and sufficient con fee of the following described premises, viz.:

"All that certain tract, piece or parcel of lan lying and being in the City and County of San State of California, bounded and described as follo

"Bounded on the north by Twenty-second Str east by Douglass Street, on the south by Elizab and on the west by the Ocean House Road. seventeen and 59-100 acres of land, and being designated as the 'Pioche Reservation.'

"It is further adjudged that the defendant, up livery or tender of said conveyance, do pay to th or their attorneys the sum of twenty thousand purchase money specified in said contract.

"Done in open Court, this 24th day of March, A

It is claimed by appellant that the late District no power or jurisdiction to enter the decree set f agreed statement, and that the matters which it p determine were and are exclusively within the jur the Probate Court.

The District Court found that all the property in of the plaintiffs in the action in that Court (plain present action), was held by the late F. L. A. Pio time of his death, not as his individual estate, surviving partner of the copartnerships—"Pio erque & Co." and "Pioche & Bayerque."

The Probate Court has jurisdiction to settle th a deceased person, and has no power, save in cepted instances, to determine disputes between t representatives of the deceased and third persons sets, which pass to the representatives to be ad under the proper direction of the Probate Court the individual estate of the decedent. This clear not only from the very nature of the office of th Courts and the purposes for which they are orga

from the following, and other, sections of the Code of Procedure: Sections 1452, 1453, 1466, 1467, 1469, 1519, 1522, 1523, 1525, 1536, 1542, 1544, 1555, 1560, 1581, 1643, 1645, 1651, 1658, 1665.

The ultimate interest of Moss in the partnership of Pioche, Bayerque & Moss passed, on his death, to his personal representatives, as did that of Bayerque in the partnership of Pioche & Bayerque when this latter partnership was dissolved by the decease of the last named. The conflicting claims of these several estates cannot be determined by the Probate Court. If Pioche were still living the Probate Court, in which the administration of the estate of one of the former partners was pending, could not state nor settle a stated account between him and the executor or administrator. It could only order him, as surviving partner, "to render an account." But in such case, if the account is not satisfactory, the executor or administrator may maintain against the surviving partner any action which the decedent might have maintained. (C. C. P., 1585.) Of course any balance which may be decreed by a Court of equity in favor of or for the representatives of the estate of the deceased, against the surviving partner, belongs to the estate potent from the death of the testator or intestate. But the Probate Court has no more jurisdiction to provide for a partnership account, and decree a balance, where the partnership has been dissolved by the death of a partner than where it has been dissolved by any other cause.

Immediately prior to the death of the late Pioche, he held the property of which he died possessed in trust for the partnership. Instead of treating the original partnership, that of Pioche & Bayerque, as dissolved, and proceeding with all reasonable diligence to settle the partnership affairs, he continued the partnership business with the partnership funds and assets. It is clear that the representatives of the deceased partners respectively had their option to compel Pioche during his lifetime to account as upon a dissolution at the time of the death of the partner, or to account for profits, including those made after the death. The trust in which he was clothed by the law, or which he assumed in consequence of his conduct, passed with the partnership property to the present plaintiffs. The partnership as it were in the nature of a special fund, subject to be empaneled in accordance with the duties Pioche had assumed as partner. As none of the partners are surviving, no one has a better right to the possession of the partnership property than have the present plaintiffs, who have received it *colore*

officii, as executors of him who held it, and who had interest in the residuary rights of his estate.

It would seem to be sufficiently plain that the plaintiffs were justified in filing a bill in the District Court to obtain a decree, settling the conflicting rights of several estates and defendants therein named, if, in a proceeding commenced by any or all of such defendants, the plaintiffs would have been liable as trustees, holding property in their possession subject to the same trust with it was held by the late Pioche. That they would have been so liable has been authoritatively settled in this State. In *People vs. Houghtaling*, 7 Cal. 348, it was held that an administrator sued in equity to compel him to pay over to the County Treasurer moneys collected by the intestate's Collector could be treated as the trustee of a special fund constituting no part of the assets of the estate. It was received by an administrator in payment for goods sold to the intestate, as factor, upon a *del credere* commission, and was adjudged to form no part of the estate, and to be payable by the consignor. (*Stanwood vs. Sage*, 22 Cal. 348; *Lathrop vs. Bampton*, 31 Cal. 25, it was said that a factor had, at the time of his death, the possession of a fund, or other property into which he may have come, and such fund or property has come into the possession of his executor, the latter holds it upon the same trust as the testator.

As was said by Mr. Justice Rhodes in *Gleason vs. Bannister*, 34 Cal. 258, "when a partnership is dissolved by the death of one of the partners, its assets, debts and credits are as distinct from those of its late members, until its affairs are wound up, as before the dissolution." It would seem equally clear that, if all die (whether within the jurisdiction of the same or of different Probate Courts), the debts and credits of the partnership do not become a part of the estate of the last survivor, but continue as a separate existence; and that the rights of the representative successors of the several partners can only be determined by the Court of equity, which has the power and machinery for settling those rights by appropriate decree. Here was no additional element of the assertion of conflicting claims to the same fund or assets.

Our conclusion is that, upon well established principles of equity jurisprudence, the District Court had jurisdiction to render the decree which is attacked by appellant.

Judgment affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6851.

THE MATTER OF THE ESTATE OF J. P. RICAUD,
DECEASED.

LAW—ESTATE IN LITIGATION—DISTRIBUTION. If the property of an estate is in litigation, the estate is not ready for distribution, and the Probate Court is justified in refusing to make an order to that end until the litigation is finished.

Appeal from Probate Court, San Francisco.

Well & Needles, for appellant.

Boe & Harrison, for respondent.

KEE, J., delivered the opinion of the Court:

September, 1879—nearly two years after the executors of the estate had qualified—the widow of the deceased, as one of the legatees, petitioned the Probate Court for an order authorizing the executors to sell, either at public or private sale, so much of the real property of the estate as the Court should judge necessary and beneficial, for the purpose of paying her a legacy of \$5,000, bequeathed to her by the will of the decedent. Opposition was made to the petition, and, on the issues framed, the Court found, among other facts, that all debts and charges against the estate had been paid; that the amount of expenses incurred, and likely to be incurred, in the administration was unknown; that all the personal assets had been disposed of, except the sum of \$2,720, which was then in the hands of the executors; that this sum was wholly insufficient to pay the expenses of administration and the legacies bequeathed to the widow and daughter of the decedent; and that a sale of the realty of the estate was necessary to pay them; but all of the real estate, claimed to be assets, was involved in litigation by an action of ejectment which had been commenced against the decedent in his lifetime, and had been pending against the executors since his death, and was still undisposed of; therefore, the Court held that the estate was not ready for distribution, and would not make an order until the action of ejectment was determined; and a writ of prohibition was granted to prevent the probate court from making it was ended.

On appeal, judgment refusing an order of sale is complained of as error, upon the ground that it is against the findings of

fact and the law. It is contended, on behalf of the appellant, that the lower Court had no discretion to refuse the order of sale.

Whether a Probate Court is bound to decree a sale of assets of an estate, for the payment of legacies, depends upon the condition of the estate and of the property to be sold. If all debts and charges against the estate, including the expenses of administration, have been fully paid, and there is in the hands of the executor or administrator an ascertained balance of assets subject to distribution, the estate is ready for distribution, and distribution cannot be delayed. The Court "must" proceed to make distribution. (Secs. 1665, 1543, C. C. P.) The command of the law is, under such circumstances, peremptory. (Estate of Pritchett, 51 Cal. 568.)

But where there is not an ascertained balance of assets, real or personal, in the hands of the executor or administrator; or if the assets are merely claimed to exist, and the right to them is involved in litigation, either by an action brought by the executor or administrator to recover them for the estate, or by an action against the executor or administrator to recover them from the estate, then the estate is not ready for distribution. The very existence of the property as assets is uncertain, and contingent upon the determination of the suits. It may or may not belong to the estate. Under such circumstances an estate would not be ready for distribution, and the Probate Court would have power, in the exercise of a judicial discretion, to delay the distribution of the estate until the right to the assets be judicially determined, and the balance of assets for distribution be ascertained.

According to the principles of a Court of Chancery, a trust or power to sell real estate should not be exercised while there is a cloud over the title affecting its value, or the land is held adversely. (*Peck vs. Peck*, 9th Yerger, 304.) And payment of a legacy would not be decreed until the Court discovered, by an account or otherwise, that the executor had actually in hand sufficient assets, real or personal, to pay the legacy.* (*Andrews vs. Hunneman*, 6th Pick, 128.) Nor was an action maintainable at common law for a legacy unless the executor had expressly promised to pay it, or there was proved to be a sufficiency of assets actually in hand for its payment. (*Deeks vs. Strutt*, 5th T. R. 690; *Atkins vs. Hill*, 1st Cowp. 284.)

It follows that this estate was not in a condition to be distributed, and that the Court below did not err in delaying a

distribution until a determination of the suit pending against the estate.

Order affirmed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 2.

[Filed May 20, 1881.]

No. 6844.

AUGUST SCHROEDER, AUGUST SCHROEDER, JR.,
AND HERMANN VON OREN, RESPONDENTS,

VS.

SCHWEIZER LLOYD TRANSPORT VERSICHERUNG'S GESELLSCHAFT, APPELLANT.

INSURANCE—CONNECTIONS—CHANGE OF SHIP WITHOUT CONSENT OF INSURED—EVIDENCE—CONDITION. Defendant insured wheat of plaintiffs at and from San Francisco to Batavia on board the steamship "Colorado" and "connections." The wheat was shipped on the "Colorado" at San Francisco, and it then proceeded to Yokohama, where it was transhipped by the ship-owner to other steamships. The change of ship was made because the master of the "Colorado" had received instructions from the owner to return to San Francisco: *Held*, that the effect of changing the ship was to change the risk, and that the defendant was not liable for a loss occurring subsequent to the transshipment. It is an implied condition of an insurance policy that the ship named in it shall not, after the commencement of the risk, be changed without necessity or the consent of the insurer. By the fact that a given ship is named in the policy, the insurer has a right to say that he had some peculiar reasons for insuring a risk on that very ship, which should not apply to any other. The necessity which will justify a change of ship on the part of the master only arises in case the ship is disabled by stress of weather, or other peril of the sea, from carrying on the cargo to the place of destination. The word "connections," as used in a policy of insurance by which goods are insured from place to place on board a steamship and its connections, has reference to a state of things existing at the time of the execution of the policy, and not to a casual, unusual and unanticipated connection with a ship substituted for the occasion; upon a state of things temporary in its nature, and unknown at the time that the contract was made: *Held*, accordingly, that where it had been the custom of the ship-owner to carry goods from San Francisco to Batavia without transshipping at Yokohama, but to carry the same to Hongkong and there transship them, that the latter port was the "connection" referred to in the policy: *Held*, further, that by reason of the word "connection" in the policy, the plaintiffs were put upon inquiry as to the connections of the steamship "Colorado," and that, while evidence was admissible to show the meaning of the word, the plaintiffs could not be allowed to show that they did not know what such meaning was.

Appeal from Fourth District Court, San Francisco.

Andros & Page, for appellants.
S. V. Smith & Son, for respondents.

THORNTON, J., delivered the opinion of the Court.

This is an action on a policy of insurance to recover for the loss of 3,951 sacks of wheat, shipped by the plaintiff, and other wheat in sacks at San Francisco, and delivered at Batavia.

The cause was tried by the Court, judgment was given for the plaintiffs, from which defendant appealed.

All the facts appear in the decision of the Court, which was as follows:

"The above entitled action came on to be tried by the Court, a jury having been expressly waived by the parties on the 23d day of July, 1879, and now the Court, having considered the pleadings and the evidence, finds that the facts to be all the facts of the case:

"1. On the 12th day of August, 1874, the defendant, a corporation, issued and delivered to one J. W. H. C. a policy of insurance, on behalf of the plaintiffs, who were then and are now engaged in business under the firm name of Busing, Schreiner & Co. the policy of insurance, a copy of which is attached to the complaint.

"2. Subsequently, before the commencement of this action, said policy was assigned and transferred to plaintiffs, at the commencement of this action were, and are now the legal owners and holders thereof.

"3. On said day plaintiffs shipped on board the steamer "Colorado," then in the harbor of San Francisco, 3,951 sacks of wheat mentioned in said policy, and during all the times mentioned herein, the property was owned by the plaintiffs.

"4. The "Colorado" then proceeded to Yokohama, where the master of said steamship received instructions from the company to return to San Francisco, instead of to Hongkong. The reason of these instructions was that the steamer "Alaska," which should have sailed previous to the time from Hongkong to San Francisco, was unable to make the trip, as it was paired at Hongkong, and was unable to make the trip to carry the mails between said ports, in the regular course of the business of said company. The agents of the company at Yokohama thereupon transshipped the sacks of wheat from the "Colorado" into the steamer "Sierra Nevada" and "Costa Rica," belonging to the company, by which steamships it was conveyed to Hongkong.

Six hundred of said sacks of wheat were thus placed on the "Sierra Nevada," and were by her and connecting vessels safely conveyed to Batavia.

Three thousand nine hundred and fifty-one of said wheat, of the value of \$13,887, were thus placed on the "Costa Rica," and were by her transported to Hongkong where they were received by the agents and servants of said company, and by them, as a matter of necessity in accordance with the established custom prevailing at Hongkong, which was known to the defendant at the time of issuance of the policy, placed and stored in a warehouse at the harbor front of Hongkong, there to await the first opportunity to ship them to Batavia.

While said 3,951 sacks of wheat were in said warehouse awaiting reshipment, and before any opportunity to ship them to Batavia had arrived, the said harbor of Hongkong was visited by a typhoon, or storm of extraordinary violence, which drove the waters of the harbor up on to the shore so that they broke in the roof and windows of the said warehouse, drenched the said wheat with sea water and filled the interior of the warehouse to the depth of three feet.

By reason of said flooding and drenching the said three thousand nine hundred and fifty-one sacks of wheat were so thoroughly soaked with sea water and rain that they began at once to sprout, and became swollen and increased to such an extent that it would have been impossible to transport it to Batavia. No vessel would have received it, as there would have been danger during the voyage of its ignition from spontaneous combustion; and, if it had been taken to Batavia it would have arrived there as moldy wheat, and not as wheat.

The said three thousand nine hundred and fifty-one sacks of wheat were thereupon surveyed by the Government Surveyors at Hongkong, and by their advice sold at public auction for the sum of three thousand five hundred and forty-one dollars and ninety-two cents on the twenty-second day of November, 1874.

The custom and usage of the Pacific Mail Steamship Company, with reference to the voyages of their steamships between San Francisco and Hongkong, with cargo for Hongkong or Batavia, was for the vessel on which the cargo was taken at San Francisco, to carry the same to Hongkong without transshipping it at Yokohama, at which port they touched, or making connection with any other vessels, at the last named port for such purpose.

This usage had existed, without interruption, since the day of January, 1867, the time of the establishment of the Company's line of steamers between San Francisco and Hongkong, the only instance of such transshipment of the cargo in question. The defendant had known the custom, and charged a lower rate of premium on the cargo insured on, because it expected that no transshipment was to be made at Yokohama.

"And from the foregoing facts the Court concluded as following to be its conclusions of law:

"1. The said three thousand nine hundred and fifty-one sacks of wheat were, while in the warehouse at Yokohama, insured and protected by the policy from loss or damage by any of the causes enumerated therein.

"2. The said three thousand nine hundred and fifty-one sacks of wheat were totally destroyed.

"3. The cause of the destruction of said three thousand nine hundred and fifty-one sacks of wheat was a storm at sea.

"4. The transshipment of the wheat from the steamer at Yokohama, was justified by the circumstances, the policy and contract of the parties, and did not constitute a breach of the policy.

"5. The division of the four thousand five hundred and fifty-one sacks of wheat, and the putting of part of it on another vessel, were justified by the circumstances, and by the policy and contract of the parties, and did not avoid the policy.

"6. The total destruction of the three thousand nine hundred and fifty-one sacks of wheat was an absolute loss and not a partial loss or a particular average loss, within the meaning of the policy.

"7. By the policy, the wheat therein mentioned was insured only during or upon the usual voyage of the steamers appertaining to said Company, from San Francisco to Hongkong, but was insured while it showed no connection with said "Colorado," or any other steamer with which the "Colorado" might anywhere connect, or to which she was to transfer her cargo.

"8. The 'connections' in said policy of insurance mentioned was not a connection in the first instance, at the port of Hongkong, by and between said "Colorado" and some other vessel, but included the transshipment which was made by the "Colorado" with the "Nevada" and the "Costa Rica" at Yokohama.

The plaintiffs are entitled to recover from the defendant the said value of the said three thousand nine hundred and fifty-one sacks of wheat, less the amount for which they were sold, with interest thereon at the rate of ten per cent per annum, from the 22d day of September, 1874, up to the 16th day of April, 1878, and from that date at the rate of seven per cent per annum, amounting in all to the sum of fifteen thousand and seventy-one dollars and forty cents.

The policy was made part of the findings of fact by reference to it as attached to the complaint.

The wheat was insured at and from San Francisco to Panama board the steamer "Colorado" and connections, against the perils of the seas, fires, pirates, etc.

It appears in the findings of fact, the wheat was shipped on the "Colorado" in the harbor of San Francisco, and it proceeded to Yokohama, where the ship-owner transferred the wheat from the "Colorado" to the steamships "Nevada" and "Costa Rica," belonging to the same company, by which it was carried to Hongkong.

The change was made, not from the fact that the "Colorado" had been in any way disabled or rendered unnavigable, with the consent of the insurer, but from the fact that when it reached Yokohama the master received instructions from the owner to return to San Francisco instead of proceeding to Hongkong. (See fourth finding, where the facts are stated, and the reason that these instructions were given to the master.)

The defendant contended that this transshipment was unjustifiable, and the effect was to change the risk, and, in consequence, the defendant insurer was discharged from its contract. If the contract was thus changed the defendant cannot be held liable.

"It is an implied condition of the policy that the risk remained in it should not, after the commencement of the voyage, be changed without necessity or the consent of the insurers, for such unnecessary or unsanctioned change of ship would produce an alteration of the risk run by the insurers, and, therefore, exempt them from their liability." (1 Arnould on Ins. 177.) The author cites Emerigon on Insurance, Sec. 16, Vol. 1, 419, 425, Ed. of 1827, and Pothier on Insurance, Nos. 68, 69, 70, 71.

In insurance on goods, freight, profits, etc., the same principle applies: "That if, either before the commencement of the voyage, or during the course of it, the ship named in the policy be changed without necessity, or without the consent

of the underwriters, they will be discharged from (1 Arnould on Ins. 178.)

The author then proceeds and gives a reason for "So invariable is this rule that it holds good even if the substituted ship may be of larger dimensions and greater strength than that originally named in the policy; the fact that a given ship is named in the instrument, the writer has a right to say that he had some peculiar reason for insuring a risk on that very ship, which should not be applied to any other.

"On the same ground, if without consent or new cargo is either shifted from the ship named in the policy to one as good or better, or is originally loaded on board the latter instead of on board the ship named, and the cargo perishes on the voyage, yet the underwriter shall be discharged from all liability, for the policy never attached to the goods loaded on board the substituted ship." (1 Parson's M. Law, 276; *Bold vs. Rotherham*, 8 C. 10; *Winthrop vs. Union Ins. Co.*, 2 Wash. C. C. 7, 20.)

If, however, the underwriters consent, or if the ship, in the course of the voyage becomes so disabled as to be incapable, by any means at the master's disposal of being repaired at all, so as to take on the cargo, the master may procure another ship in which to forward the cargo to the place of destination, and the liability of the underwriters for the goods will still continue; and they will be liable for losses occurring subsequent to the transshipment. (*Id. vs. Plantamour vs. Staples*, 1 Term Rep. 611, Note; *Dougl. 1*; *Schieffeln vs. N. Y. Ins. Co.*, 9 John, 20; *Ins. 485-6*; *Treadwell vs. Union Ins. Co.*, 6 Cowen, 10; *vs. Ocean Ins. Co.*, 12 John, 107; *Abbott Ship*, 6 C. 10; 365, Notes; 3 Kent, 5 Ed., 257; see, also, *Lee's Law of Shipping and Insurance*, 412.)

The necessity which will justify such action on the part of the master only arises in case the ship is disabled by reason of weather, or other peril of the sea, from carrying the goods to the place of destination. (*Lee's Law of Shipping and Insurance*, 412; *Arnould on Ins. 185*; *Shipton vs. Thorpe*, 10 C. 10; and *Ellis*, 336.)

No such necessity appears in this case. The fact that the transshipment appears in the fourth clause of the policy is not sufficient to justify it.

But it is contended that such consent is implied by the use of the word "connections" in the policy. The underwriters stipulating for indemnity as regards the steamer "Colorado" and its connections.

h is the significance of this word, the change of ship ed. This word is simple and clear in its meaning. tes the act of connecting with some means of car- forming a junction with such means. (See Web- d Worcester's Dictionaries word "connection.") vident that the contract of insurance was entered a regard to a state of things as to the connections of "Colorado" existing at the time of the execution policy. Reference certainly was not made to a casual, and unanticipated connection with a ship substituted occasion, upon a state of things temporary in its na- unknown at the time that the contract was made. y was not in the mind of either of the contracting hat the "Colorado" would be turned back when she Yokohama, for the reason that the "Alaska" was from taking its place in the regular course of busi- the company (owner), and was then undergoing re- Hongkong. It does not appear that they did and therefore we can assume it as an established fact, parties did not know when the contract was made) ts concerning the "Alaska." It further appears e facts found that the only connections which the do" had were those at Hongkong—for it is stated tenth finding of facts that the custom and usage owner, the Pacific Mail Steamship Company, with e to the voyages of their steamships between San co and Hongkong with cargo laden for Hongkong or was for the vessel on which such cargo was taken at ncisco, to carry the same to Hongkong without trans- g it at Yokohama, at which port they touched, or connection with any other vessel or vessels at the ed port for such purpose, and that this usage had without interruption since the 1st day of January, e time of the establishment of the company's line of s between San Francisco and Hongkong, the only e of such transshipment being that of the cargo in n. This, in our judgment, is enough to show that e the connections, and the only connections existing ime that the policy was entered into—a connection to e at Hongkong.

should it be held that such were not the connections d to in the policy? The word was used as of some- en in being. We find something in being fully an- y to the word used. The "Colorado" was spoken of policy as having connections. It did have connections gkong as found, and had no connections elsewhere.

Why are not these the connections mentioned in and not any such temporary connection availed of on and for the occasion by reason of an existing condition which had just occurred, and which neither of the parties was aware of at the time they entered into the contract of insurance?

Certainly we are justified in holding that the contract was entered into with reference to a state of things known to the parties and not be justified in holding that they contracted with reference to a state of things unknown, unanticipated and in its nature. If they had any intention to contract with reference to a change in the usual course, it might have been easily and clearly expressed in the contract.

But it is said that the plaintiffs had no knowledge of the custom and usage found in the tenth finding of fact. If they did not, it was their own fault. They were in error by the use of the word in the policy that there was no change of conditions of the "Colorado." The use of the word "change" in inquiry. If they did not know it, certainly they should have inquired. But surely they knew what they were contracting about. They were contracting about the connection of the ship "Colorado," and we think they should not have been ignorant of them. It is not averred in the findings that they did not know it. If they did not know it, they claimed that it was a mistake on their part—whether it was or law it is unnecessary to say. If a mistake of fact or law, it might have the effect of releasing them from the obligation of the contract; certainly it could not extend to the obligation of the defendant, or create a new one by the contract was not the contract they entered into. They should have proceeded to have it reformed. Not so, it must be construed as it is.

Nor does it make any difference that the words "custom and usage" are used in the finding with regard to the contract. The words used indicate a course of business followed by the owners of the ship "Colorado" for a series of years and establishing a state of things referred to in the contract of insurance as existing at the time it was signed and entered. It would not be proper to hold of this that it was a mercantile custom or usage, which did not bind the parties, because there is no finding that they were bound by it. It signifies a course of business of a particular line of ships with reference to which a contract was made. See *Evans v. The Schooner "Reeside,"* 2 St. 292; *The Schooner "Reeside,"* 2 St. 292. It is referred to in the written contract in such language as to show to men of but little experience in business

of business in existence was alluded to and meant. e to any other conclusion would be to hold that the s did not know what they were contracting about—a ion which nothing appearing in the record indicates, n which the law withholds any justification.

course of business had existed from January, 1867, me the policy was executed, which was on the 12th August, 1874, more than seven years before the date tioned. Under the pleadings, evidence should be to show the meaning of the word "connections," to show that the plaintiffs did not know what that y was. (1 Greenl. Ev., Section 292, Schooner "Ree- t *supra*.)

th and 8th conclusions of law are not proper deduc- om the facts found. We understand them as conclu- law—as constructions of the instrument under the and, and not as findings of fact. If they were find- fact they would be inconsistent with other findings, the tenth. As conclusions of law, they are not justly le from the facts.

contract was made with reference to a voyage of the do" to Hongkong, where a connection would be y a change of ship from that port to Batavia, unless mer became disabled and was rendered unnavigable, change of ship might have been made at Yokohama. ange, at the port just named, might also have been y made with the consent of the underwriters. Neither occurred, and therefore the change of ship was not le. The risk was changed, and the underwriters ell say *non in haec foetera venimus*. Whether the risk eased or diminished by the change, the result is the The terms of the contract do not allow it, nor does

oss at Hongkong occurred subsequent to the change and under the terms of the policy, the defendant responsible for any such loss occurring after that As the result here reached is conclusive, it is un- ry to consider the other questions which were so ably ed on the argument.

udgment should be reversed and the cause remanded Superior Court of the City and County of San Fran- ith a direction to enter judgment for the defendant, s so ordered.

oncur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 2.

[Filed May 20, 1881.]

No. 6263.

SIMMLER, RESPONDENT,

vs.

SAN LUIS WATER CO., APPELLANT.

ESTOPPEL—RECITAL—DEED—ADMISSION. An estoppel must be shown to prevent every intent. A recital in a deed executed by plaintiff that the latter was "about to divert" waters of a creek through plaintiff's land, the granting clause being to convey water in pipes over and across the land: *Held*, no estoppel by plaintiff that defendant had acquired a right to divert the waters of the creek. Before an admission can be treated as an estoppel it must be so broad and certain as to admit of no other construction than that the right claimed by estoppel has been admitted.

Appeal from First District Court, San Luis Obispo.

F. K. Mille, for respondent.*W. J. & Wm. Graves*, for appellant.

SHARPSTEIN, J., delivered the opinion of the court.

This action is brought to obtain an injunction restraining the defendant from diverting the waters of a creek which flow through the lands as the "Arroyo de San Luis Obispo" from its natural course through lands belonging to the plaintiff. The court has granted an injunction as prayed, and the defendant has asked for a new trial, which was denied, and from this judgment this appeal is taken.

It appears by the record that the plaintiff was the owner of a tract of land which required irrigation and that the waters of the above-named creek which flow through the premises were used for that purpose. In April, 1877, the defendant diverted the waters of said creek from the premises, and deprived the plaintiff of the water which had been using, and which was necessary for the cultivation of said land. As a riparian owner the plaintiff is entitled to the relief prayed and granted, unless the defendant can show that it has acquired a paramount right to all the waters of the creek. And it claims that by virtue of a deed executed by it on the 17th of July, 1877, it has acquired that right. The deed, after stating the name of the parties to it, contains the following:

"That whereas the said parties of the second part (the defendant) are about to divert the waters of the Arroyo de San Luis Obispo Creek, and to appropriate the same for

plying the city of San Luis Obispo with water, and
sious of conveying the said waters in a pipe covered
ground across the lands of the party of the first part
plaintiff).

w, therefore, * * * in consideration," etc., * *
"the said party of the first part does hereby grant to
ty of the second part and its assigns forever, the right
ey water in iron pipes over and across the lands of
l party of the first part."

e is no direct grant of any water, or of the right to
t. No positive or plain reference to the waters of
is Obispo Creek is contained in the granting clause;
defendant relies upon the recital in which a reference
waters of that creek is contained, as a conclusive
on, by the plaintiff in her deed, of the right of the
nt to divert all the waters of said creek from her
s.

plaintiff, by way of recital or otherwise in her deed,
mitted the right of the defendant to divert said waters,
ild doubtless be estopped from denying it in this
But before an admission can have that effect it must
oad and certain as to admit of no other construction.
are not permitted to indulge in suppositions or to
ferences from the language employed in such cases.
e case of *Kepp vs. Wiggett* (1 *Man. & G.*, 625), a
n the condition of a bond that a person named therein
een duly nominated and appointed Collector," was
to estop the defendants from showing that the person
ad not been completely appointed.

ase is cited as an illustration of the strict adherence
courts to the rule that an estoppel must be certain to
cent.

case before us there is no direct and positive ad-
in the recital relied upon that the defendant had
or had any right to divert any, much less all of the
f said creek. The recital is that it is "about to
said waters. But that falls far short of an admission
ad acquired a right to divert them. There is nothing
ecital that is inconsistent with the theory that the
t had acquired the right which it now sets up. Nor
anything in it that is inconsistent with the theory
ad not acquired, but confidently expected to acquire
ne recital had been that the defendant had diverted
rs of said creek, and that had been followed by a
a right to conduct the same over the plaintiff's land,
would be very different from what it now is. But

here there is no admission that the waters had been or that any right had been acquired to divert the water. The plaintiff has not admitted the existence of such a right. He is not estopped from denying it. And it does not follow from us that a recital that the defendant was about to divert the waters was an admission that it had a right to do so.

The record does not contain matter sufficient to establish an estoppel *in pais*. And the circumstance of the defendant having previously acquired a right to divert the water from the branch of the San Luis Obispo Creek does not, in itself, shed any light upon the subsequent transaction between the parties herein.

There is nothing in any of the circumstances of this transaction which is not entirely consistent with the theory of either side. In determining what it was intended to convey, we must look to the deed alone. We find a plain and positive grant to the defendant of a right to divert the water over the plaintiff's land. Beyond that there is no matter of conjecture. But there is evidence in the deed of exceptions which tends to prove that the plaintiff intended to convey anything more than what is clearly stated in the deed, viz.: a right of way.

There are other questions discussed by counsel on both sides which the conclusion at which we have arrived renders it unnecessary to consider.

Judgment and order confirmed.

We concur: Thornton, J., Myrick, J.

IN BANK.

[Filed April 6, 1881.]

No. 7714.

GOOD, RESPONDENT, vs. WINANS, APPELLANT.

NOTICE OF APPEAL. A certificate upon motion to dismiss the appeal contains evidence that the notice of appeal has been served on the respondent or his attorney.

Appeal from Superior Court, San Francisco.

C. Bartlett, for respondent.

L. Shearer, for appellant.

By the COURT:

It does not appear from the certificate that the notice of appeal was served on the respondent or attorney: *L. Myrick vs. Tierney*, 54 Cal. 583, an answer to a motion to dismiss. The motion to dismiss appeal herein is therefore

DEPARTMENT No. 1.

[Filed May 3, 1881.]

No. 7582.

ROBERTS, APPELLANT,

VS.

FNA INSURANCE COMPANY, RESPONDENT.

—APPLICATION—WARRANTIES. An insurance policy referring to an application," the latter is part of the policy, and any breach of its conditions which are warranties avoids the policy.

al from Superior Court, San Bernardino County.

Boyer, for appellant.

Willis, for respondent.

the COURT:

policy contained a covenant: "Any false representation of the insured, etc., or any omission to make known the fact, etc., or any misrepresentation whatever, shall render the policy void."

"Application" the insured, plaintiff, "hereby covenants and agrees that the foregoing (answers to questions) shall be a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant; and the same is hereby made a condition of the insurance and a warranty on the part of the insured." The application contains the question and answer: "10. Is there any incendiary danger apprehended or threatened?" The demurrer to defendant's answer (the answer setting forth that the reply to question 10 "was false and fraudulent at the time of making it, in this, that incendiary danger was apprehended by the said James M. Coburn, as he well knew; and he, the said James M. Coburn, did, in reliance on said answer, falsely and fraudulently represent to the plaintiff that such danger was not apprehended; and he acted with intention to deceive and defraud the plaintiff") was properly overruled. When the policy refers to the application, and makes it part of the policy, any breach of the conditions or representations which are warranties avoids it.

Although a circumstance in itself of trifling import, we are inclined to say that the testimony of the witness Brunn that the premises were partly burned "last summer," in the

absence of the assignor of plaintiff, in no degree show that he had apprehension of incendiarism.

The policy and application were set forth in the and the defendant in his answer alleged a fact which constituted breach of a warranty. The instrument complained of was not erroneous.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6638.

MIX, RESPONDENT, vs. MILLER, APPELLANT.

CONFLICT OF EVIDENCE—PARTIES—FINDINGS—INTEREST. If there is a substantial conflict in the testimony as regards defect of property and also as regards the findings of fact, the judgment of the Court below will not be disturbed. Interest upon a claim for money ordered and money expended runs from the date of the claim becoming due.

Appeal from Twelfth District Court, San Francisco.

S. W. Holladay, for respondent.

H. K. Moore and *D. H. Whittemore*, for appellant.

By the COURT:

This was an action to recover the value of making a search and abstract of the *Las Animas* and for money expended for traveling expenses, board and assistants.

The Court below found, among other facts, that the search was completed in a workmanlike and professional manner on the twentieth of September, 1876; that the abstract was on that day delivered to the defendant, who received it the same and was satisfied with it; that the services of the assistants were reasonably worth \$10,000; that there had been an account of them \$2,800, leaving due and unpaid \$7,200 on the twentieth day of September, 1876; that the claim with interest from that date, judgment was entered in favor of plaintiff.

It is assigned as errors that there was a defect in the evidence for plaintiff, that the findings are not justified by the evidence and that the Court erred in allowing interest. On the first two grounds there is a substantial conflict of evidence.

Plaintiff was entitled to interest from the date the demand became due. (Sec. 3287, C. C.)

Judgment and order affirmed.

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VII.

JUNE 11, 1881.

No. 16.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed May 21, 1881.]

No. 6933.

MCCOURTNEY ET AL., APPELLANTS,

VS.

FORTUNE ET AL., RESPONDENTS.

ENT—PRIOR POSSESSION—EVIDENCE—RECORD OF FORCIBLE ENTRY
DETAINER SUIT—FINDINGS—STATUTE OF LIMITATIONS—PRACTICE—
ERROR NOT PREJUDICIAL. In an action of ejectment where the prior
possession of the parties from whom plaintiffs and defendants derived
their respective claims of title is a material fact in the case, a judg-
ment roll in a forcible entry and detainer case between the parties
under whom plaintiff and defendant respectively claim is admissible
tending to prove prior possession. Findings will not be disturbed
where the evidence is substantially conflicting. A judgment will not
be reversed for want of a finding if the appellant is not prejudiced by
the failure to find. A finding upon the plea of the Statute of Limita-
tions is not necessary where it appears that the plaintiffs were not, on
the day claimed or at any other time, the owners in fee simple abso-
lute, nor entitled to the possession of the premises in dispute. In
ejectment the plaintiff must recover upon the strength of his own
title, and not upon the weakness of the title of his adversary.

Real from Fourth District Court, San Francisco.

Montgomery, for appellants.

W. Brooks, for respondents.

KEE, J., delivered the opinion of the Court:

There was an action of ejectment for part of Block 119,
North Addition, San Francisco.

It was alleged in the complaint that Margaret McCourtney,
J. H. McCourtney, was, on the fourth day of March,
and at the commencement of the action, the owner in
fee simple absolute, possessed and entitled to the posses-
sion of the land in controversy, and that on the twenty-fourth
of March, 1868, the defendants entered upon it and
disseised the plaintiffs therefrom. The answer contains a
denial, a plea of ownership of the lands by the

defendant J. W. Coleman at the commencement of the action, and of the Statute of Limitations.

Upon the trial the Court below found:

"That the said M. P. McCourtney was not, on or before March, 1868, nor at any other time, the owner of the land, nor did she at the commencement of the action possess or have possession of, nor was she entitled to the possession of, the land described in the complaint, nor any part thereof."

"Nor did the defendants, on or before March, 1868, or at any other time, wrongfully or unlawfully oust the said M. P. McCourtney thereof, nor did the defendants wrongfully or unlawfully withhold possession thereof from the plaintiffs, or either of them."

"That the said land is not the separate property of the plaintiffs, but was, at the time of the commencement of the action, the property of the defendant Coleman."

It is assigned as error that the Court failed to apply the Statute of Limitations; that the evidence is insufficient to justify the findings, and that there was error in admitting in evidence against the plaintiffs' objection records and papers in an action of forcible entry and detainer wherein one Evans was plaintiff and Osborne and Coleman were defendants, and the judgment roll in the case of *Stevenson et al. vs. John Evans et al.*

First—It appears that the plaintiffs claimed title by mesne conveyances through Osborne from John Evans, who claimed to have made a location upon the land in 1850, and enclosed it by a substantial enclosure, and continued in the possession of it until he sold and conveyed it to Osborne; and the defendants claimed title from an alleged prior possession of one John Evans, who claimed, had possession in 1849, by residence, enclosure, and cultivation, and continued in possession until March, 1868, when he transferred it to one McRae, through whom it came as through Osborne, the defendant Coleman defendants. The prior possession of the parties from whom the plaintiffs and defendants derived their respective claim of title is a material fact in the case, and the judgments and verdicts which were offered in evidence by the defendants and which were set aside by the Court were records of contests between the parties for the possession of the land before the commencement of this action had acquired their rights, and they were competent as tending to prove possession. (*Unger vs. Geary*, 39 Cal. 39; *Geary vs. Simmons*, 39 Id. 224.)

Second—There is a substantial conflict in the

as to the possession of the persons under whom the claimed title. Where that is the case, findings made on such evidence will not be disturbed by an appellate court on the ground that the evidence was insufficient to support the findings, or that the findings are contrary to the evidence.

—It is the duty of a trial Court to find upon all the issues in a case, and it has been held that, if there is a finding on a material issue, the judgment cannot be reversed. (*Phipps vs. Harlan*, 53 Cal. 87.) But a judgment will not be reversed on that ground where the want of a finding on a particular issue is not prejudicial to the appellant.

No judgment can be reversed for any error or irregularity in the proceedings of a case which does not affect substantial rights of the parties. (Section 475, C. C. P.) When the Court found that the plaintiffs were not, on the fourth day of March, 1868, nor at any other time, the owners in fee simple absolute, nor possessed nor entitled to possession of the premises in controversy, it found, in fact, that the plaintiffs never had any possession or title to the premises, to be barred by the Statute of Limitations, and it was bound to find directly that a right or title, which had an existence in fact or law, was barred by the Statute of Limitations.

The omission of the Court to find directly upon the issue of the Statute of Limitations did not, therefore, in any way affect the plaintiffs. If a finding had been made upon the issue in their way, it would not have helped or hurt them. As the plaintiffs were not the owners, never had been in possession, and were not entitled to the possession, it was of no moment whether the defendants were in possession or not under a claim derived from the Statute of Limitations or any other law.

Having failed to establish a right of entry in themselves, they were not entitled to recover, whether the defendants had title or not; for in ejectment a plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's.

The Court had found upon the issue in favor of the defendants, it would have been equivalent to a finding, as it did find, that the land was, at the commencement of the action, the property of the defendant Coleman. The omission to find directly upon the issue was, therefore, if anything, a mere irregularity, from which no possible injury could result to the appellants, and it is no ground for the reversal of the judgment.

The judgment and order affirmed.

Concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6853.

SPEARMAN, RESPONDENT,
VS.

THE CALIFORNIA STREET R. R. CO., A

NEGLECT—CONFLICT OF TESTIMONY—VERDICT—WITNESSES
the question of negligence, the jury having found that
was the guilty party, and there being testimony susta-
elusion, the verdict will not be disturbed. The cre-
nesses is for the jury to determine.

Appeal from Fifteenth District Court of San

Alex. Campbell, for respondent.*H. S. Brown and J. S. Foulds*, for appellant.

By the COURT:

The principal point relied on by the appellant evidence does not show that the deceased came by reason of the negligence of the defendant, but by his own fault. While it is true that the deal of testimony in the record going to show that was the true cause, it is also true that there is the contrary. Thus: "James A. Garrett, being testified: I am an engineer in the employ of the Railroad, and have been an engineer since I was 15 years old, most of the time in England. I am familiar with the manner of running street railroads. I never saw Frank Spearman in his life. He was killed by a car at Fillmore Street. I was present. It was at that time No. 5 was on the stand ready to start, and I was on No. 6 and the car attached stood between me and the north track; No. 5 was on the south track. When I arrived I did not see any one around No. 5, and I went from my dummy around No. 5 and into the southeast corner of California and Fillmore streets. I saw the conductor and driver of No. 5 in the car. I asked the conductor if they were going on, and they were behind time, and told them to go on."

"The driver (Mr. Hoag) left the saloon and went to the dummy. The conductor went to the lunch table to get some lunch, and then rushed to the door. When he opened the door he said, 'All right,' with his mouth full. Mr. Hoag was standing with his hand on the lever,

door; and when Matthews came out he pulled the dummy then 'surged' ahead. Deceased had his foot on the front step, on the inside of the dummy. The surge of the dummy whirled him round. He tried to recover himself, and fell in front, underneath the dummy. I rushed to where the dummy was. It took less time than it takes to get up. Before the dummy started, it stood opposite to the door. When the driver pulled the lever, he was looking out the door of the saloon, and did not see the man get on. The reason I went down was because No. 5 was out of time, and I had been down several times during that week to help him, because he had lost his hold of the rope which propelled the cars. I had only known Hoag as a driver for a few days previously. I did not think he was competent. He had several accidents, missing his rope. It happened more frequently with him than any of the rest. I worked on a railroad of this description over a year. Helped out on the Clay Street Railroad, and went on their dummy car; then went on the California Street Railroad, and helped to fix the tracks up and fix the dummies. At the time of the accident I had driven a dummy, something similar to the one, for about six months on the Clay Street Railroad, with reference between them being that one works with a rope and the other with a wheel; and I acted as dummy driver on the California Street Railroad from the time it started, commencing work for that company on the second of February, 1878, and working up to the last week in March. Consider myself an expert. I did not consider a competent driver from his way of handling a dummy. He worked on the rope, and stopped and started quickly. He caused the dummy to surge ahead when starting, and stopped to stop too quickly. This would have the effect of jerking people about on the dummy, and throwing them backwards and forwards, making the dummy jump. The proper way to start a dummy is to start it easily, taking it up slowly, and the friction of the rope passing through the wheels will carry it along. I saw Hoag at that time jerk the rope when he started; that the dies came down solid on the rope, and the dummy 'surged' ahead, rolling and jerking the passengers backwards and forwards. This was caused by pulling the lever suddenly on. The conductor's business was to start the cars. There was no car on No. 5 dummy. They were running a car with each alternate dummy. No. 6 had a car, and No. 7 did not. When the deceased was taken under the dummy he appeared to be crushed across the middle and lay helpless. I called to a boy there to fetch

Matthews (the conductor of No. 5) and Dr. Humphreys was there, and stated who he was. Dr. Humphreys said to him, 'See what you can do for this man. The company will pay all the damages.' He said the man was dead. I attribute the man's death to the sudden stop ahead of the dummy. It threw him around on the dashboard."

The material parts of the testimony of this witness are contradicted by that of a number of other witnesses. The credibility of the witnesses was a question for the jury, and is not for us. We have read the record carefully, and find it sufficient testimony, if true, to sustain the verdict of the instructions asked for by the defendant, with but with a modification to which objection is made. The cause it is not sound law, but because, it is claimed, there was no evidence to which it applied. In this, however, we are mistaken. The case was fairly put to the jury. The Court below, which, upon evidence substantially the same, returned a verdict for the plaintiff.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7492.

CLARK, RESPONDENT, vs. HIS CREDITORS, APPELLANTS.

IMPEACHING VERDICT BY JUROR—CONFLICT OF TESTIMONY—NOT EXCEPTED TO. A juror will not be allowed to impeach his own verdict. If a substantial conflict exists in the testimony, the Court below must stand. Instructions will not be excepted to if not excepted to in the Court below.

Appeal from Superior Court, Los Angeles County, California. *Gardner, Brunson & Wells*, for respondent. *Barclay & Wilson*, for appellants.

By the COURT:

Appellant says, first, that the jury were guilty of error in their verdict; second, that the evidence did not justify the verdict; third, that error occurred in the giving of instructions.

1. There was no evidence of misconduct in the verdict other than the affidavit of jurors. A juror cannot impeach his own verdict. (*Polheimus vs. Heiman*, 50 Cal. 400.)

2. There was a substantial conflict in the testimony.

3. The instructions were not excepted to.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6681.

SHATTUCK, RESPONDENT,

vs.

OAKLAND SMELTING AND REFINING CO.,
APPELLANT.

ATION TRUSTEES CANNOT VOTE THEMSELVES THE CORPORATE PROPERTY—APPEAL—ACCOUNT STATED. Trustees of a corporation cannot vote themselves the property of the corporation. An appeal from a judgment must be taken within one year. A resolution of the trustees of a corporation to the effect that it had been deemed expedient to have had conveyed to certain persons stock of the corporation, and that the trustees had so conveyed the stock, followed by a resolve that the trustees should be allowed a certain sum for the shares of stock so conveyed and for services rendered, has none of the elements of an account stated.

deal from Third District Court, Alameda County.

ke & Phelan, for respondent.

F. & W. H. Sharp, for appellant.

ss, J., delivered the opinion of the Court:

e plaintiff sues as assignee of Sextus Shearer, David B. n and Albert N. Shearer, of certain demands of these s against the defendant corporation in the form of ac- s stated. Wilson and the Shearers were trustees of rporation at the time the alleged indebtedness arose, t the time the alleged accounts were stated.

establish his cause of action the plaintiff, at the trial in ourt below, offered in evidence an entry in the book of ds of the corporation as follows:

n adjourned meeting of the Board of Trustees of the nd Smelting and Refining Company, held at the office d company in the city of Oakland this eighth day of Jan- 1874, at 7 o'clock P. M. Present—Sextus Shearer, F. Boardman, Albert N. Shearer and David B. Wilson. following preamble and resolutions was presented by F. Boardman and unanimously adopted:

Whereas, for the purpose of promoting the interest of rporation, it was deemed expedient by all the stock- rs to have conveyed to Morgan S. Hurd 100 shares of pital stock of the corporation, to Charles H. Swain 200 s, and to L. Eisenhuth 100 shares, for the purpose of

securing their services and influence in carrying on the business of said corporation; and whereas, in pursuance of such determination, Wm. F. Boardman did, on the 1st day of November, 1873, convey to Morgan S. Boardman 10 shares of the capital stock of said company, and on the 1st day of December, 1873, conveyed to Charles H. Swain 80 shares of said capital stock, and Sextus Shearer on the 13th day of November, 1873, convey to L. E. Boardman 10 shares of the capital stock of said company, and David B. Wilson Shearer did, on the 11th day of December, 1873, convey to Charles H. Swain 80 shares of the capital stock of said company;

"Therefore, resolved, that the construction of said works be charged with said stock at twenty dollars per share, and that the several parties who furnished the same be credited therewith at that price;

"And that it is also resolved that William F. Boardman be allowed for his services performed for said company from the first day of April, 1873, to the first day of January 1, 1874, the sum of (\$1,800) one thousand eight hundred dollars;

"That Sextus Shearer be allowed for his services performed as President of said company, from the 1st day of November, 1873, to January 1, 1874, the sum of two thousand dollars (\$2,000); and that David B. Wilson be allowed for his services rendered as Secretary of said company to January 1, 1874, the sum of (\$976.63) nine hundred and seventy-six dollars and sixty-three cents; and that Albert N. Shearer be allowed for labor and services rendered by him for said company the sum of (\$300) three hundred dollars.

"On motion, the Board of Trustees adjourned.

"DAVID B. WILSON, Secretary.

According to the record before us, this resolution was the basis of the plaintiff's demand. To its introduction the defendant objected, on the grounds that it was in violation of the pleadings and contrary to public policy. The objection should have been sustained. The resolution was not one of the elements of an account stated. It is one of the elements of a corporation cannot vote themselves the property of the corporation in the manner here adopted.

The appeal from the judgment was taken too late to be dismissed.

Appeal from judgment dismissed. Order of judgment reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1. .

[Filed May 21, 1881.]

No. 6705.

KENFIELD, APPELLANT, vs. HAYES, RESPONDENT.

EJECTMENT—WHO MAY ATTACK PATENT—EQUITABLE DEFENSE—AMENDED ANSWER SUPERSEDES ORIGINAL—STATUTE OF LIMITATIONS.
 A patent not void on its face, issued by the State for land which it had a right to dispose of, is conclusive evidence of title in an action of ejectment as against a defendant who shows no connection with the common or paramount source of title. The single fact that an application to the State for land had been rejected does not connect the applicant with the title of the State. An equitable defense to an action of ejectment must contain, in substance, the elements of a bill in equity. An amended answer supersedes the original. The Statute of Limitations commences to run upon the issuance of a patent.

Appeal from Fifteenth District Court, San Francisco.

B. Lamar, for appellant.

B. Newman, for respondent.

KEE, J., delivered the opinion of the Court:

This appeal comes from an order vacating a judgment in favor of the plaintiff and granting a new trial. The reason for the decision was made is not exhibited in the order. It appears from the transcript on appeal that the judgment was given in an action of ejectment, in which the plaintiff established a right of entry to the land in dispute, by a patent issued to him by the State, in February, 1875.

The patent is not void on its face. It shows that it was issued by an officer authorized by law for land which had been listed to the State, and under the provisions of certain acts of the Legislature, which provided for the sale and conveyance of the land, as part of lands which had been granted to the State by several Acts of Congress recited therein. No defect appearing upon the face of the patent, and the land was such as was subject to disposition by the State, it was, therefore, valid; and, in an action of ejectment, it is conclusive evidence of title against a defendant who shows no connection with the common or paramount source of title. (*vs. Meador*, 16 Cal. 295; *O'Connor vs. Frasher*, No. 6705, opinion filed January 4, 1881.) No such connection was shown to exist by the defendant in this case; he did not claim to be in privity with the State or the United States.

The amended answer contains a specific denial of the allegations of the plaintiff's complaint; a defense of the Statute of Limitations, and a statement of new matter, in which, the defendant admitting that the patent had been issued to the plain-

tiff, as a purchaser from the State, upon a location claimed to have made in October, 1868, and that had been listed to the State, it was *averred* that the defendant had also applied to purchase the land from the State in March, 1873, under the provisions of Title V of the Political Code; that the Surveyor-General of the State rejected his application, and approved the application of the plaintiff; but that, in rejecting the one and in approving the other, the officer had been imposed on by the affidavit of the plaintiff, which contained a false and untrue statement of the alleged possession of the plaintiff, and of his improvement upon the land at the date of his location.

This new matter constituted no defense, legal or equitable. It was not a legal defense, because in ejectment the legal title must prevail. When, therefore, the plaintiff sought to establish his legal title by the patent from the State, the defendant could not attempt to impeach it by showing that the patent was acquired by fraud. The patent was conclusive as to the title, and the Court below did not err in rejecting the defense which was offered by the defendant for the purpose of showing that the plaintiff had obtained his title by fraud. It did it err when it instructed the jury "that the patent was void, that the land was listed over to the State, and that the defendant had a right to convey it, * * * and that the patent could not be attacked by a party who had not, at the time the patent issued, some privity to the land, or some title therein; therefore they should find for the plaintiff."

Of course, a legal title in the hands of a party who is not liable by a Court of equity; and, under our system, the superior Courts, in the exercise of their equity powers, in a proper proceeding, protect the just rights of a party whose patent wrongfully issued to another, or held by him for those who may be rightfully entitled to it. (*Lockwood*, 21 Cal. 220.) But the equitable rights of a party who claim that the title was intended for their benefit, cannot be made to appear. It does not appear by the facts that the defendant stood in such relation to the plaintiff as to be a plaintiff; he does not seek to charge the plaintiff with fraud in the patent for his benefit; nor has he stated, in his affidavit, any equitable defense, any prior rights vested in him which the patent conflicts, or any grounds upon which he could invoke the powers of a Court of equity to set aside the patent as fraudulent, or to compel a conveyance of the land to himself.

The single fact that the State rejected his application for a purchase, does not, of itself, connect him with the

ate, nor invest him with an interest in the land, which
s him to protection from a Court of equity. It shows
that he had no right to purchase the land from the
and, therefore, no right to collaterally attack a patent
id on its face, or to control it in equity.

an equitable defense, or as a cross-complaint, the new
of the defendant's answer was wholly inadequate. It
no material issue with the plaintiff's complaint. It
settled that an equitable defense interposed in an ac-
f ejectment should contain in substance the elements
ill in equity; and that its sufficiency, other than as to
form, is to be determined by the application of the
observed in Courts of equity when relief is granted.
r vs. *Fulton*, 47 Cal. 147; *McCauley vs. Fulton*, 44 *Id.*
Bruck vs. Tucker, 42 *Id.* 352; *Milton vs. Lawlor*, 53 *Id.*

amended answer was the only answer in the case.
it was filed it superseded the original answer, and all
ons in relation to the abandoned answer were waived
e filing of the amended answer upon which the defend-
ent to trial. (*Barber vs. Reynolds*, 33 Cal. 497; *Kelly*
Kibben, 54 Cal. 192.)

plaintiff's cause of action was not barred by the Stat-
Limitations, for the patent was issued in February,
and the action was commenced in February, 1876.

error appearing in the proceedings of the Court below
the entry of the judgment for the plaintiff, we think
ourt erred in setting aside the verdict and judgment
ranteeing a new trial.

order is therefore reversed.

concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 2.

No. 5833.

PORTER vs. WOODWARD.

[NOTE.]

the COURT:

Court desires to add to the paragraph of the opinion
above cause commencing with the words, "The Court
as a fact," etc., the following: "The right to recover
s case is rested entirely on a prior possession. No
species of title was offered or admitted in evidence as
undation of plaintiff's right to recover. The transcript
rts to embody all the testimony."

DEPARTMENT No. 1.

[Filed May 21, 1881.]

No. 6761.

COTTLE, RESPONDENT, vs. MORRIS, AP

EJECTMENT—ADVERSE POSSESSION—GOOD FAITH—CONTRADI

An action of ejectment having been submitted to the jury on the theory that good faith was a necessary element in adverse possession, and the jury, upon special issues, returned contradictory findings on such question: *Held*, that the case be retried.

Appeal from Twenty-third District Court, San Francisco.

B. S. Brooks, for respondent.

Hassett & Severance, for appellant.

By the COURT:

In this action, which is ejectment, the defendants, among other defenses, the Statute of Limitations, returned a general verdict for the plaintiff, and the jury answered to the following special issues: "Second—Did the possession of the land by the defendant constitute a claim of right made in good faith? No. Third—Was the possession adverse to plaintiff? Yes. Fourth—Did it continue for five years uninterruptedly before the commencement of the action? Yes."

Assuming that the question of good faith entered into the question of adverse possession (and the Court instructed the jury that it did), the finding that the jury held adverse possession of the disputed premises included a finding that such holding was in good faith. The jury, in another and distinct finding, declared that the holding was not under a claim of right made in good faith. Upon the assumption that the question of good faith was immaterial, the findings on the question of adverse possession were, therefore, contradictory. On the other hand, if the question of good faith was immaterial, the finding that the defendants had held adverse possession of the land for the statutory period would control the general verdict; but, as the case was submitted to the jury on the theory that good faith was a necessary element in adverse possession, and as, upon that theory, the findings of the jury are contradictory, we think it proper to reverse the cause for a new trial.

Judgment and order reversed, and cause remanded for a new trial.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6725.

PLE, RESPONDENT, vs. KIRKPATRICK, APPELLANT.

BY PROCEEDINGS—COSTS AGAINST THE STATE—COST BILL NOT ALLOWED BY THE COURT. Under Section 772 of the Penal Code, relative to the summary removal of public officers for breach of duty, the Clerk of the Court is not authorized to enter judgment for costs against the State where the charges have been unsustained. It is not error to strike from the files of the Court a memorandum of costs which has not been allowed by the Court.

Appeal from Twenty-third District Court, San Francisco.

Ash, for respondent.

Red Clarke, for appellant.

THE COURT:

Under the provisions of Section 772 of the Penal Code, information was filed in the name of the People of the State on the relation of one Alderman in one of the late District Courts of the City and County of San Francisco against the defendant, who was at the time Chief of Police of that city and county, with refusing and neglecting to perform the official duties pertaining to his office. Upon investigation the Court found the charges unsustained. Within ten days thereafter the defendant delivered to the Clerk of the Court and served upon plaintiff a memorandum of his costs in the proceeding amounting to \$451.40, and thereupon the Clerk entered a judgment acquitting the defendant of the charges, and that he recover of the plaintiff, described in the bill as the People of the State of California on the relation of Oscar Alderman, the amount of the defendant's costs. Motion made the Court struck out the bill of costs, and granted this order defendant appeals.

Assuming that the People of the State were parties to the proceeding, the Clerk had no power to enter judgment against the State, for the reason that the statute did not authorize it. The statute declares that if on the hearing it appears that the charge is sustained, the Court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the *informer*, and such costs as are allowed in civil cases." There is in this statute no warrant for a judgment against the State for costs. And assuming, without arguing or intimating, that under its provisions the Court

might have allowed the defendant costs against it did not do so in this case. The defendant been allowed costs, there could be no error in bill of costs from the files.

Order affirmed.

DEPARTMENT No. 1.

[Filed May 21, 1881.]

No. 6813.

SHARP, RESPONDENT, vs. MILLER, APP

TENDER—CURRENCY—SURETIES—GOLD COIN. A tender in legal tender notes of the amount due upon an appeal where no objection is made to the amount, and the appeal from does not require payment in gold coin, payment, and discharges the sureties from their obligation.

Appeal from Fifteenth District Court, San Francisco.

G. F. & W. H. Sharp, for respondent.

P. B. Ladd, for appellant.

McKEE, J., delivered the opinion of the Court.

It appears by the pleadings in this case that on January 18, 1875, a judgment for the sum of \$300 was rendered against respondent in the case against one C. L. Morris, District Court of the City and County of San Francisco. Morris appealed from the judgment to the Supreme Court, and to render his appeal effectual, the appellants as his sureties, entered into an appeal bond, by which they undertook, "that if the judgment appealed from be affirmed, or the appeal be dismissed, they will pay the amount directed to be paid by the order, or the part of such amount, as to which the judgment shall be affirmed, if affirmed only in part, and the costs which may be awarded against the appellants on the appeal, and that if the appellant do not make payment within thirty (30) days after the filing of the appeal from the Supreme Court in the Court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor against the sureties for such amount with the interest that may be due thereon, and the costs which may be awarded against the appellants on the appeal."

The judgment was affirmed by the Supreme Court on October 28, 1877, and October 27, 1879, the respondent moved to set aside the action out of which this case arises, to reco

es the amount of said judgment and interest thereon the date of its rendition, which, he alleged in his complaint, he had demanded from them, but they refused to pay. Answer of the defendants admits that the plaintiff on February 28, 1877, demanded \$331.50, as the amount of the principal and interest then due upon said judgment, and they complied with the demand by tendering, in their behalf, and in behalf of their principal, the said sum of \$331.50 "in legal tender notes—the lawful money of the United States—in satisfaction of the judgment and interest due, but the plaintiff refused to receive and accept the tender on the ground that the tender was not made in gold coin of the United States." Answer also sets up the defense of a former adjudication.

On the issues made by the complaint and answer, the court below found that the defendants had not tendered the amount of the judgment; that the plaintiff had never refused to accept any tender or offer of the money demanded, and that the cause of action had not been formerly adjudicated. The findings, appellants complain that they are not sustained by the evidence; are, in fact, wholly against the evidence, and that is the only question.

The evidence there is absolutely no conflict. Plaintiff, in his testimony, admits that at the request of the court for Morris he computed the amount of principal and interest due upon the judgment, and authorized one of his clerks to go and collect it from the defendants. He gave no other direction than that; nothing was said to him about collecting the money in gold coin, and, in fact the tender was not, so far as appears by the record before us, made in gold coin. Evidence is uncontradicted that the plaintiff tendered and demanded the money from the defendants, and they offered it to him in United States legal tender notes. The tender was made to the amount of money offered. It was refused by the clerk until he could again see the plaintiff. When the plaintiff saw, who told him to refuse anything but gold coin, and the clerk accordingly refused to accept the tender which was offered. Having tendered the money, the defendants, as sureties, did all they contracted to do. The tender was made, although it was refused, was equivalent to a payment by them. (*Solomon vs. Reese*, 34 Cal. 36.) And they were discharged from their obligation as sureties on the appeal bond. (*Hayes vs. Josephi*, 26 Cal. 535.) Therefore they were entitled to a finding and judgment. Judgment reversed.

Concur: McKinstry, J., Ross, J.

DEPARTMENT No. 2.

[Filed May 21, 1881.]

No. 6809.

MCNEIL, RESPONDENT, vs. POLK, APPELLANT.

ALIENS—INHERITANCE—LAWS OF MEXICO—PARTNERSHIP—CHASEE FROM HEIR OF PARTNER IN WHOSE NAME PROPERTY STANDS. Under the laws of Mexico, in force February 14, 1850, aliens could inherit real estate. 50 Cal. 153, followed. Real estate purchased with funds and on partnership account, the title being taken in the name of the partners, is partnership property, and the name the title stands holds it in trust for his copartners. Such trust may be enforced against the administrator of such partner, it cannot as against a *bona fide* purchaser of such partner. Possession, which is not adverse, is prima facie evidence of title. A party is not affected by a defect in the title which he is about to purchase.

Appeal from Fourth District Court, San Francisco.

B. S. Brooks, for appellant.*Stetson & Houghton*, for respondent.

SHARPSTEIN, J., delivered the opinion of the court.

It is not necessary to determine in this case whether Francis W. Paty, from whom the plaintiffs derive title, is a citizen of the United States or not, because it is immaterial in this State that under the laws of Mexico, in force in California at the time of his father's death, he could inherit real estate. (*Ramirez vs. Kent*, 50 Cal. 477; *People vs. Folsom*, 5 Cal. 373; *Merle vs. Mason*, 50 Cal. 386.)

The title of Francis W. Paty was not affected by the death of Gleeson and Mrs. Daley. That was determined in *Smith*, 50 Cal. 153. Of the estate left by Gleeson, Francis W. inherited one-sixth from his father and one-twentieth from a deceased brother, which together constitutes one-fourth of the estate of which he inherited. At the time of the purchase of the property in controversy by William Paty, he and his brother were partners, and the purchase was made with the funds and on partnership account, although the title was made to William individually. He held the property in trust for the partnership, and that trust might be enforced against his administrators and heirs, but not against a *bona fide* purchaser from the latter without notice. It was not claimed that the plaintiffs had actual or

of the trust, but that they had notice of facts sufficient to put them upon inquiry, which they omitted to make, that they are therefore chargeable with knowledge of all they might have ascertained by prosecuting such inquiry.

The circumstance of the defendant being in possession of the premises is relied upon by the appellant as sufficient to have put the plaintiffs upon inquiry; but the Court held that such possession was not, prior to the commencement of this action, adverse to the claim of the plaintiffs or grantors. Such being the fact, it was unnecessary for the Court to make any inquiry in regard to the defendant's possession. If it was not under a claim hostile to the title which they were about to purchase, they could not be affected

judgment and order affirmed.

Concurred: Ross, J.

Concurred in the judgment: Morrison, C. J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7632.

BENNINGER, RESPONDENT,
vs.

GENIX INSURANCE COMPANY, APPELLANT.

—INSTRUCTIONS. Where there is evidence to sustain a finding of fact, the appellate Court will consider the fact established. If an instruction as asked is too broad, the Court is justified in refusing to give it to the jury.

Appeal from Superior Court, San Bernardino County.

Allen, for respondent.

Willis, for appellant.

THE COURT:

The question of the ownership by plaintiff of the property was submitted to the jury, and there was evidence to sustain the findings. The question as to the waiver by defendant of "proofs" of loss was also submitted to the jury, and there was evidence to sustain a finding of said waiver.

Instruction No. 1, asked by defendant, was too broad. Applying the law and facts to be as therein suggested, it would not have followed that defendant would have been entitled to a verdict as to the whole demand.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed May 21, 1881.]

No. 6766.

ALAMEDA MACADAMIZING COMPANY

VS.

LUCIEN B. HUFF ET AL., APPELLANTS

STREET IMPROVEMENT IN OAKLAND—RESOLUTION OF INTENTION SUNDAY—PREMATURE AWARD. A resolution to improve a street in Oakland must be published five days on Sunday. If the fifth day falls on Sunday the resolution is published on the next day. An award of the contract premature, as the City Council does not acquire jurisdiction until the full publication has been had.

Appeal from Third District Court, Alameda County.
Montgomery & Martin, for respondent.
Wilson & Otis, for appellant.

By the COURT:

Action to recover for street work done in the city of Oakland. Article VII of the complaint avers (and is concluded by the averment) that the City Council passed a resolution ordering the work on the third day of March, 1874, and published an invitation for sealed proposals five days in the *Oakland Daily News*, beginning on the fourth day of March, 1874. The fourth day of March was Wednesday, and the fifth day for publication of the resolution was Monday. On the ninth day of March the contract was made to the plaintiff's assignor.

Section 5 of the Act of April 4, 1864 (see Statutes, page 333), requires that a notice inviting sealed proposals shall be published for five days in a daily paper designated by the Council. And by subdivision 6 of the same Act it is provided that "the provisions of the Act required by the provisions of the Act shall be published daily (Sundays excepted) in a newspaper designated by the City Council of said city."

Excluding Sunday from the five days required for publication, the last publication should have been on Monday, the ninth day of March. It does not appear that any publication was made on that day; and the award on the ninth was premature. (*The People vs. McCain*, 50 Cal. 210; *Same vs. McCain*, 50 Cal. 210; Political Code, Sec. 3259, 1st Hittell.)

Judgment reversed.

DEPARTMENT No 2.

[Filed May 22, 1881.]

No. 7580.

STEINBACH ET AL., RESPONDENTS,

VS.

PERKINS ET AL., APPELLANTS.

GRANT—CONFIRMATION—PETITION—DECREE OF BOARD OF LAND COMMISSIONERS—PATENT—PRACTICE—FINDINGS. It being contended that a patent issued upon the confirmation of a Mexican grant was made as to certain lands, on the ground that the petition presented to the Board of Land Commissioners did not include such lands: *Held*, that as the petition was introduced in evidence and the transcript on appeal did not contain a copy of it or state its contents, that the finding of the Court below that the petition did include the lands would not be disturbed. The final decree of the Board of Land Commissioners upon a Mexican grant, affirmed by the District and Supreme Courts of the United States, and the patent issued thereon, are conclusive as between the United States and the claimant in the proceedings. The Commissioners and the United States Courts having had jurisdiction to determine what land was embraced within a petition, their determination that the claimant was entitled to the lands necessarily determined that such lands were embraced within the petition.

al from First District Court, Ventura County.

Brooks, for respondents.

Stems & Williams and *A. W. Thompson*, for appellants.

STEIN, J., delivered the opinion of the Court:

Appellants insist that the judgment and order denying motion for a new trial ought to be reversed, because, from whom, through mesne conveyances, the respondents deraign title, did not, in his petition for a confirmation of his claim under a Mexican grant to the lands known as the Mission lands of San Buenaventura, include "Agua Rancho," which is embraced in said confirmation and the patent issued in pursuance thereof. It is claimed that the confirmation and patent are void so far as they relate to the lands not embraced in the petition. The Court below found that the land in controversy was embraced in the petition, and the appellants attack that finding on the ground that it is not supported by the evidence. The transcript shows that the petition was introduced in evidence on the trial, but it did not contain a copy or state the contents of it. We therefore, presume that it supported the finding of the Court.

This, however, we deem to be quite immaterial. The decree of the Commissioners, affirmed as it was by the District and Supreme Courts of the United States, the patent issued in pursuance thereof, is conclusive on the United States and the claimant in that respect. And the claim of the defendants is based entirely on the proposition that the patent is void as to part which it purports to convey, and that the title to the land remained in the United States the same as if it had been expressly excluded by said confirmation, because that part was not embraced in claim as presented to the Commissioners. But it seems that the Commissioners and the Courts which affirmed the decree had jurisdiction to determine what land was included in de Poli's claim, and that they must necessarily have determined that question in determining what land was titled to.

If the lands in controversy were public lands of the United States, the defendants undoubtedly might defeat their action by proving that fact. The reverse of that fact is established, and no other valid defense appears on the record, the judgment and order of the Court below are affirmed.

Judgment and order affirmed.

We concur: Thornton, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6791.

TOBELMANN, RESPONDENT, vs. ROPER, .

STREET ASSESSMENT—PARTIES—JUDGMENT—CASES AFFIRMED.
Porter, 53 Cal. 409, and *Diggins vs. Reay*, 54 *Id.* 525, affirmed, that a street assessment lien cannot be enforced against the property owners liable therefor, affirmed.

Appeal from Twenty-third District Court, San Francisco.

J. C. Bates, for respondent.

D. H. Whittemore, for appellant.

By the COURT:

On the authority of *Clark vs. Porter*, 53 Cal. 409, and *Diggins vs. Reay*, 54 *Id.* 525, judgment and order affirmed, and cause remanded for a new trial.

IN BANK.

[Filed May 24, 1881.]

No. 6374.

THE MATTER OF THE ESTATE OF DAVID GHARKY, DECEASED.

CONTEST—ISSUES—PLEADING—EVIDENCE—INSTRUCTIONS—WITNESS TO A WILL—SIGNATURE. It is not error to refuse to submit issues to a jury in the case of a contested will, where such issues have once been presented. Questions relating to evidence, and not as to conclusions to be drawn from evidence, are not proper matters to be submitted as issues to a jury. In the case of a contested will, the only questions proper to be submitted are such as arise out of the grounds of contest set forth by contestant. (*Estate of Vartery*, December 21, 1880, affirmed.) When the grounds of contest embrace matters which are not ultimate facts, but conclusions of law, the facts relied upon must be pleaded. Instructions to a jury in which a conflict is alleged, relating to matters not properly before them, does not entitle an appellant to a reversal. A witness to a will who had no recollection of the circumstances attending its execution, but who recognized the signatures, was asked if, taking into consideration his recognition of the signatures, it was his belief that the paper was signed and executed as a will: *Held*, proper. The execution of a prior will has no bearing upon the question of the execution of a subsequent will, if the testator, at the time of the execution of such subsequent will, is of sound and disposing mind.

Appeal from Probate Court, Santa Cruz County.

Wams & Younger, for appellant.

Grey & Hall, for respondent.

RICK, J., delivered the opinion of the Court:

The deceased died August 16, 1877, aged about seventy. The proponent Werner offered for probate as the will and testament of deceased, three documents—one a will, dated July 30, 1869, and two codicils, dated respectively May 19, 1873, and August 15, 1877. The codicils referred to confirmed and ratified the will, except as to changes made therein. The will named the proponent Werner as executor, and devised and bequeathed all of the property of the deceased to five persons named therein, and their successors, in trust; to manage the same, and out of the annual income to pay one-half thereof to his son, David Gharky, during his natural life; after the death of the son, to the son's wife during her life, and after her death to the son or children of said son until they attain their majority; the other half to maintain such poor people of Santa Cruz County as may be chosen by the trustees; and after the death of the son and wife and the majority of his children,

This, however, we deem to be quite immaterial. The decree of the Commissioners, affirmed as it was by the District and Supreme Courts of the United States, the patent issued in pursuance thereof, is conclusive in the United States and the claimant in that respect. And the claim of the defendants is based entirely on the proposition that the patent is void as to part of the land which it purports to convey, and that the title to the land remained in the United States the same as if the land had been expressly excluded by said confirmation. The reason is because that part was not embraced in claim which was presented to the Commissioners. But it seems to us that the Commissioners and the Courts which affirmed the decree had jurisdiction to determine what land was included in de Poli's claim, and that they must necessarily have determined that question in determining what land was titled to.

If the lands in controversy were public lands of the United States, the defendants undoubtedly might defeat their action by proving that fact. The reverse of that fact is established, and no other valid defense appearing on the record, the judgment and order of the Court be affirmed.

Judgment and order affirmed.

We concur: Thornton, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6791.

TOBELMANN, RESPONDENT, vs. ROPER, APPELLANT.

STREET ASSESSMENT—PARTIES—JUDGMENT—CASES AFFIRMED.—*Porter*, 53 Cal. 409, and *Diggins vs. Reay*, 54 Id. 525, affirmed, that a street assessment lien cannot be enforced against the property owners liable therefor, affirmed.

Appeal from Twenty-third District Court, San Francisco.

J. C. Bates, for respondent.

D. H. Whittemore, for appellant.

By the COURT:

On the authority of *Clark vs. Porter*, 53 Cal. 409, and *Diggins vs. Reay*, 54 Id. 525, judgment and order affirmed, and cause remanded for a new trial.

IN BANK.

[Filed May 24, 1881.]

No. 6374.

THE MATTER OF THE ESTATE OF DAVID
GHARKY, DECEASED.

CONTEST—ISSUES—PLEADING—EVIDENCE—INSTRUCTIONS—WITNESS TO WILL—SIGNATURE. It is not error to refuse to submit issues to a jury in the case of a contested will, where such issues have once been presented. Questions relating to evidence, and not as to conclusions to be drawn from evidence, are not proper matters to be submitted as issues to a jury. In the case of a contested will, the only questions proper to be submitted are such as arise out of the grounds of contest set forth by contestant. (*Estate of Cartery*, December 21, 1880, affirmed.) When the grounds of contest embrace matters which are not ultimate facts, but conclusions of law, the facts relied upon must be pleaded. Instructions to a jury in which a conflict is alleged, relating to matters not properly before them, does not entitle an appellant to a reversal. A witness to a will who had no recollection of the circumstances attending its execution, but who recognized the signatures, was asked if, taking into consideration his recognition of the signatures, it was his belief that the paper was signed and executed as will: *Held*, proper. The execution of a prior will has no bearing upon the question of the execution of a subsequent will, if the testator, at the time of the execution of such subsequent will, is of sound and disposing mind.

Appeal from Probate Court, Santa Cruz County.

Wms & Younger, for appellant.

Wey & Hall, for respondent.

CHICK, J., delivered the opinion of the Court:

Deceased died August 16, 1877, aged about seventy. The proponent Werner offered for probate as the will and testament of deceased, three documents—one a will, dated July 30, 1869, and two codicils, dated respectively May 19, 1873, and August 15, 1877. The codicils referred to confirmed and ratified the will, except as to changes made therein. The will named the proponent Werner as executor, and devised and bequeathed all of the property of the deceased to five persons named therein, and their successors, in trust; to manage the same, and out of the annual income to pay one-half thereof to his son, David Werner, during his natural life; after the death of the son, to his son's wife during her life, and after her death to the children of said son until they attain their majority; after half to maintain such poor people of Santa Cruz County as may be chosen by the trustees; and after the death of the son and wife and the majority of his children,

This, however, we deem to be quite immaterial. The decree of the Commissioners, affirmed as it was by the District and Supreme Courts of the United States, the patent issued in pursuance thereof, is conclusive on the United States and the claimant in that respect. And the claim of the defendants is based entirely on the proposition that the patent is void as to part of the land which it purports to convey, and that the title to the land remained in the United States the same as it was before it had been expressly excluded by said confirmation. Because that part was not embraced in claim which was presented to the Commissioners. But it seems to us that the Commissioners and the Courts which affirmed the decree had jurisdiction to determine what land was included in de Poli's claim, and that they must necessarily have determined that question in determining what land was titled to.

If the lands in controversy were public lands of the United States, the defendants undoubtedly might defeat their action by proving that fact. The reverse of that fact is established, and no other valid defense appears on the record, the judgment and order of the Court below are affirmed.

Judgment and order affirmed.

We concur: Thornton, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6791.

TOBELMANN, RESPONDENT, vs. ROPER, APPELLANT.

STREET ASSESSMENT—PARTIES—JUDGMENT—CASES AFFIRMED.
Porter, 53 Cal. 409, and *Diggins vs. Reay*, 54 *Id.* 525, affirming the judgment that a street assessment lien cannot be enforced against the property owners liable therefor, affirmed.

Appeal from Twenty-third District Court, San Francisco.

J. C. Bates, for respondent.

D. H. Whittemore, for appellant.

By the COURT:

On the authority of *Clark vs. Porter*, 53 Cal. 409, and *Diggins vs. Reay*, 54 *Id.* 525, judgment and order of the District Court affirmed, and cause remanded for a new trial.

IN BANK.

[Filed May 24, 1881.]

No. 6374.

THE MATTER OF THE ESTATE OF DAVID GHARKY, DECEASED.

CONTEST—ISSUES—PLEADING—EVIDENCE—INSTRUCTIONS—WITNESS TO A WILL—SIGNATURE. It is not error to refuse to submit issues to a jury in the case of a contested will, where such issues have once been presented. Questions relating to evidence, and not as to conclusions to be drawn from evidence, are not proper matters to be submitted as issues to a jury. In the case of a contested will, the only questions proper to be submitted are such as arise out of the grounds of contest set forth by contestant. (*Estate of Cartery*, December 21, 1880, affirmed.) When the grounds of contest embrace matters which are not ultimate facts, but conclusions of law, the facts relied upon must be pleaded. Instructions to a jury in which a conflict is alleged, relating to matters not properly before them, does not entitle an appellant to a reversal. A witness to a will who had no recollection of the circumstances attending its execution, but who recognized the signatures, was asked if, taking into consideration his recognition of the signatures, it was his belief that the paper was signed and executed as a will: *Held*, proper. The execution of a prior will has no bearing upon the question of the execution of a subsequent will, if the testator, at the time of the execution of such subsequent will, is of sound and disposing mind.

Appeal from Probate Court, Santa Cruz County.

Wams & Younger, for appellant.

Rey & Hall, for respondent.

RICK, J., delivered the opinion of the Court:

The deceased died August 16, 1877, aged about seventy. The proponent Werner offered for probate as the will and testament of deceased, three documents—one a will, dated July 30, 1869, and two codicils, dated respectively May 19, 1873, and August 15, 1877. The codicils referred to confirmed and ratified the will, except as to changes made therein. The will named the proponent Werner as executor, and devised and bequeathed all of the property of the deceased to five persons named therein, and their successors, in trust; to manage the same, and out of the annual income to pay one-half thereof to his son, David Gharky, during his natural life; after the death of the son, to the son's wife during her life, and after her death to the children of said son until they attain their majority; the other half to maintain such poor people of Santa Cruz County as may be chosen by the trustees; and after the death of the son and wife and the majority of his children,

the whole to go for the benefit of said person, and by said codicil named another person to be trustee in place of the person who had died, revoked every provision of the will of the son, bequeathed to him ten dollars, and directed that one-half of the income be paid to the son's wife during her life, then to the children of the two during their lives, and the remainder as specified in the will. The second codicil, by the appointment of one of the persons as trustee in place of another in his stead; and, reciting that the wife of the son had died since the making of the former codicil, and that the son and daughter, directed that one-half of the income be paid to said two children during minority, and during majority, one-half of the estate to go to the surviving survivor of them; or, if both die during minority, the income to remain in trust as before specified; said David Gharky, to be paid twenty dollars per month during his life, and neither he nor any child of his, other person named, to have any further share in the estate.

The estate of the deceased was of the value of \$30,000, as stated in the petition. Testator's death occurred in 1868, before the making of the alleged will, and in 1869.

The son, David Gharky, filed an opposition to the will, and of the papers as the will of deceased, stating his contest as follows:

"First—That the deceased, at the date of the making of the pretended will, and at the dates of the making of the several codicils thereto, was incompetent to make said will, or to make either or any of the alleged codicils thereto.

"Second—That said pretended will is not the will of the deceased.

"Third—That at the time of the making of the pretended will, and of the said several alleged codicils thereto, said deceased was laboring under and afflicted with delusion as to said contestant.

"Fourth—That at the time of the making of the pretended will, of said several alleged codicils thereto, said deceased, David Gharky, was not of sound mind.

"Fifth—That at the time of the making of the pretended will, and of the said several alleged codicils thereto, said deceased was, and had been, habitually intemperate from the excessive use of alcoholic liquors; and was thereby, and by reason thereof, incapacitated from executing said pretended will, of either or any of the said alleged codicils thereto.

Sixth—That said deceased, at the time of the signing of alleged and pretended will, and of the said several alleged codicils thereto, was laboring under insane delusions, reason of habitual intoxication, produced by the excessive use of intoxicating liquors and wines.

Seventh—That said pretended will, and said several alleged codicils thereto, are, and each of them is, void.

Eighth—That said pretended will, and the said several alleged codicils thereto, were not, nor was any or either of them signed by said deceased at a time when he was of sound and disposing mind.

Ninth—That at the time of the alleged signing of said pretended will, and of the said several codicils thereto, by said deceased, he was under undue influence, passions and prejudices against said contestant.

Tenth—That said pretended will, and the said several alleged and alleged codicils thereto, are, and each of them is, void, because the pretended bequests therein mentioned are not certain, either as to the objects or definite as to the amount, but are discretionary and not susceptible of enforcement.

Eleventh—That the said pretended will, and the said several alleged codicils thereto, are, and each of them is, uncertain and indefinite as to the powers and duties of the several trustees therein named.

Twelfth—That the duties and powers of the persons named in said pretended will, and of the said several alleged codicils thereto, are too indefinite and uncertain to authorize their enforcement by any Court."

Answers were filed by the proponent and trustees, and the case was tried by jury. The Court framed and submitted to the jury thirteen issues, viz: Three as to whether the deceased was of sound and disposing mind at the dates of the respective papers; three as to the signature to said papers; three as to the signing and attesting of said papers; and three as to whether said papers respectively were signed and attested by deceased freely, without duress, menace, undue influence or fraud; and the last issue as to whether he was at any times laboring under any insane delusion. The jury was instructed to find upon all these issues, which they did, in favor of the will and codicils. The contestant moved the Court to frame and submit to the jury thirteen questions as to which the answers are contained in the transcript. The Court denied the motion, and the contestant excepted. It is sufficient to say that such of said questions as were proper to be submitted as issues were embraced within those submitted.

of law, to be drawn from facts, must be pleaded in the language of the statute, but the facts (not the substance of the facts) relied on must be stated and facts relating thereto submitted to the jury, to the end that the Court, either upon demurrer to the statement of the facts of contest, or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found constitute a valid reason why the proposed paper should not be admitted to probate. This course is plain, logical, direct, and is a certain guide to the Court, to counsel and to the parties. The other course leads to uncertainty as to what is required, and to doubt as to what may be the basis of the objection.

The instructions to the jury in which a conflict is alleged, as to matters not properly before the jury; it is manifest that the appellant was not injured thereby, and the alleged error is no ground for reversal.

There was no error in the refusal of the Court to grant a continuance.

The questions propounded to the witness Chace were not proper for cross-examination, and the Court was justified in sustaining the objections to them.

The testimony of the witnesses to the will of July 30, 1869, being examined, had no recollection of the circumstances attending the execution of the paper, but recognized the signatures, and when asked if, taking into consideration his recognition of the signatures, it was his belief that the paper was signed and executed as stated therein. The Court admitted the testimony of the witness. The authorities and the reasons sustaining this ruling are ample.

The witness Wanzer was sworn as a witness on the part of the contestant, and being shown papers purporting to be a will and the death of deceased, dated November 3, 1853, was interrogated as to their execution. The Court sustained objections to the testimony. There was no error in the ruling. Under what circumstances, under the issues in this case, the evidence was offered, we do not perceive. The will of July 13, 1869, and the testimony assumed to dispose of the entire estate, and the validity thereof would not be affected by any prior will. If the deceased was of sound and disposing mind at the time of executing the papers in question, the execution of prior wills was of no consequence.

No error appears in the record; therefore, the judgment and order are affirmed.

Concur: Sharpstein, J., McKinstry, J., Thornton, J.,
son, C. J., Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed May 24, 1881.]

No. 7639.

MCGARY, RESPONDENT,

VS.

PEDRORENA ET AL., APPELLANTS

PRACTICE—SERVICE OF AMENDED COMPLAINT—DEFAULT—JUDGMENT—BILL OF EXCEPTIONS—WAIVER. A copy of an amended complaint filed by leave of the Court, need not be served upon defendants who have made default to the original complaint. (*Ellis v. Ellis*, 53 Cal. 293, distinguished.) Service of a copy of an amended complaint is waived by filing an answer thereto. A party who has served with an amended complaint, filed by leave of the Court, must come from the defendants not served. The irregularity of a default, not appearing upon the judgment roll, is not embodied in a bill of exceptions.

Appeal from Eighteenth District Court, San Diego.

H. W. Corklin, for respondent.*A. B. Hotchkiss* and *A. Brunson*, for appellant.

SHARPSTEIN, J., delivered the opinion of the court.

The respondent brought an action to foreclose a mortgage, and in addition to the mortgagor, Pedrorena, named several other persons, who are alleged to have, or claim to have, some interest in the premises, which is subsequently found to be subject to the lien of plaintiff's mortgage, defendants.

Only one of the defendants—Pedrorena, the defendant—appeared in the action. He demurred and moved to be struck out, and after his demurrer and motion to strike out were overruled, filed an answer to the complaint. As plaintiff, by leave of the Court, filed an amended complaint, The defendant Pedrorena again demurred and moved to be struck out. The demurrer and motion were overruled. He filed an answer to said amended complaint. Judgment was entered in favor of the plaintiff and against the defendants. Two of the defendants—Pedrorena and McDonald—appeal from that judgment. The point upon which they mainly rely as constituting error for which the judgment should be reversed is that a copy of the amended complaint was not served upon McDonald.

It has been held that an amendment to a complaint may be made "of course * * * at any time before answer is filed, or after demurrer filed, or after demurrer and before the

of law thereon, by filing the same as amended," must be served upon the adverse party before his default can be regularly entered. (C. C. P. 472; *Elder vs. Spinks*, 53 Cal.

at the complaint in this case was not amended "of course;" nor before demurrer filed; nor before the trial of the issue of law thereon.

Section 432, C. C. P., in the chapter relating to demurrers, prior to the amendment of March 9, 1880, provided that: "If the complaint is amended, a copy of the amendments must be filed, or the Court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments to be served upon the defendants to be affected there-

in order to give force and effect to both of these sections of the Code, we must hold that Section 472 applies to amendments made before answer filed and before the trial of an issue of law upon a demurrer, and that Section 432 applies to amendments made after an answer is filed, or after the trial of an issue of law upon a demurrer to a complaint. It is claimed in this case that the Court required a copy of amendments to be served upon any of the defendants. They were all regularly served by summons and a copy of the original complaint. Since the entry of the judgment in this case in the Court below, Section 432 has been amended and the construction which we have given to it applies to the language of the original section. As to the defendant who answered the amended complaint, service of a copy of it was undoubtedly waived, and it made no difference to him whether the other defendants were served or not. This question comes before us upon an exception of the defendant Pedrarena to the ruling of the Court upon his objection "to the trial of the cause at the time on the amended complaint, on the ground that said complaint had not been served on the other defendants," one of whom was McDonald, who did not object to the trial proceeding, or except to the ruling of the Court upon the objection raised by Pedrarena. The objection should have come from one or more of the defendants who had not been served, if from anybody; and as they did not severally or collectively object except, we cannot reverse the judgment as to them, or as to any of them, upon an exception taken by a party who had no right to take it for them, or either of them. If the decision as to appellant McDonald is erroneous by reason of his default not having been regularly entered, that error does not appear upon the judgment roll; and we cannot consider

an exception to the ruling of the Court which alone, unless he took the exception, in person ney.

The appellant, Pedrorena, who took the exception avail himself of it for the obvious reason that to a ruling which in no way concerned him.

No error appearing in the record, the judgment

We concur: Myrick, J., Morrison C. J.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6844.

RAVENTAS ET AL., APPELLANTS, vs. GREEN, I

GROWING CROP—ATTACHMENT—MORTGAGE. A growing crop of attachment. Personal property not capable of man possession of the attachment debtor, is subject to att lien of an attachment on a growing crop operates a quent mortgagee, with notice of the attachment.

Appeal from the Twelfth District Court, County.

Fox & Ross and *D. M. Delmas*, for appellants.
Kincaid & Spencer, for respondent.

Ross, J., delivered the opinion of the Court:

One McClellan had leased a tract of land, on w growing a crop of unripe grain. An action was against him for the recovery of a money demand action a writ of attachment was issued and le Sheriff on the growing crop. Afterwards McC cuted to the assignor of the plaintiffs, who had the attachment, a chattel mortgage on the crop. crop matured the Sheriff, holding the writ, rea subsequently, under an execution issued in the ac McClellan, sold it. The present action is brov holders of the chattel mortgage to recover of de crop or its value. It is contended by the appell tiffs in the Court below—first, that an unripe gr is not the subject of attachment; second, if so was no valid attachment in this case; and, third, be true, that the lien of the attachment was aban

There is no doubt that an unripe growing crop

erty. It is property subject to attachment. (Code of Civil Procedure, Sec. 541.) And is personal property. (Civil Code, 2955; *Davis vs. McFarlane*, 37 Cal. 638.) And it is personal property not capable of manual delivery. (*Davis vs. McFarlane*, *supra*, and authorities there cited.)

ing personal property, not capable of manual delivery, being subject to attachment, how is it to be attached? The third subdivision of Section 542 of the Code of Procedure, it is provided that "personal property, capable of manual delivery, must be attached by taking it into custody," and in the fifth subdivision that "debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owning such debts, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ." It is claimed that this subdivision does not apply to a case like the present, where the personal property not capable of manual delivery is in the possession of the defendant in the attachment suit. It is true that the statute may admit of that construction, but we think it ought not to be given. The purpose of the statute was, as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property, provides that such property, when capable of manual delivery, must be attached by the officer taking it into his custody, but that when not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to the attachment suit, is as much liable to attachment as if in the hands of a third person. Yet we are asked to construe Section 542 as to exempt such property from attachment when it is in the possession of the defendant himself. A construction which would lead to such a result cannot be adopted.

In this case the Sheriff, by levying the writ, did all that was required of him. Nor was there any abandonment of the property. When the crop matured he gathered it and took it into his actual custody.

The judgment and order affirmed.

Concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed May 24, 1881.]

No. 7728.

DE CELIS ET AL., RESPONDENTS,
 vs.
 PORTER, APPELLANT.

ATTACHMENT—TRUSTEE—TRUST PROPERTY SALE. A sale under proceedings of all the interest of a trustee in real property pass the trust property nor affect the rights of the cestui q

Appeal from Seventeenth District Court, Los
 County.

Graves & Chapman, for appellant.
Glassell, Chapman & Smiths, for respondents.

By the COURT:

That E. F. De Celis held whatever of the legal ti
 premises in controversy was conveyed to him by P
 Maclay in trust for the plaintiffs, is beyond questi
 attachment and the execution sale were of his inter
 The rights of the plaintiffs were not thereby affected

"Upon a sale of real property the purchaser is su
 to, and acquires all the right, title, interest and
 the judgment debtor thereto." (Section 700, C. C.

DEPARTMENT No. 1.

[Filed May 17, 1881.]

No. 7430.

THOMAS, APPELLANT, vs. ANDERSON, RESPON

JURISDICTION OF SUPERIOR COURT—JOINDER—SEVERAL CLAIMS A
 —AMOUNT IN CONTROVERSY—REWARD. Several and disti
 by various defendants to pay sums of money as a reward
 fer jurisdiction on the Superior Court, if neither of the sum
 equals the amount necessary to give the Court jurisdiction
 383 of the Code of Civil Procedure only permits person
 liable on "the same obligation or instrument, including th
 bills of exchange and promissory notes," to be joined as
 in the Superior or Justices' Courts, as the amount involve
 jurisdiction to the one or the other of those Courts.

Appeal from Superior Court, San Bernardino Cou

Boyer & Bledsoe, for appellant.
Satterwhite, Waters, Talbot & Harris, for responde

McKINSTRY, J., delivered the opinion of the Court:

The action is to recover upon the published notice and promises following:

"We, the undersigned, promise and agree to pay the sum of \$100 opposite our names for the arrest and conviction of any person who has, within the past six months, maliciously and with intent to commit arson, burned any building within the town of San Bernardino, or who may in the future, with like intent, set fire to, attempt to burn, or shall burn or cause to be burned any building in the limits of said town.

John Anderson.....	\$100;
M. Byrne.....	100;
James W. Waters.....	100;
Christian Kurtz.....	100;
J. D. Evans.....	100;
W. Hurd.....	50;
H. Conner.....	50;
J. C. Peacock.....	50;
Wm. Farnsworth.....	50;
M. Katz.....	50;
J. Meyerstein.....	25;
H. L. Drew.....	25;
L. W. Talbot.....	25;
U. U. Tyler.....	25;
John W. Satterwhite..	20;
Legare Allen.....	10;
Ed. Hall.....	10;
W. J. Curtis.....	5;
Wm. Hawley.....	5."

The promises of the several defendants are separate and distinct. No one of the defendants promised to pay more than \$100. Neither the District nor Superior Court had jurisdiction.

Section 383 of the Code of Civil Procedure does not authorize this action, but only permits persons severally to bind themselves upon "the same obligation or instrument, including parties to bills of exchange and promissory notes," to be sued, all or any of them, as defendants in the Superior or District Court, as the amount involved may give jurisdiction to the one or the other of these Courts.

In *People vs. Love*, 25 Cal. 520, each of the defendants against whom the judgment was rendered was "liable" in a sum exceeding \$300.

Judgment affirmed.

We concur: McKee, J., Ross, J.

IN BANK.

[Filed June 1, 1881.]

No. 7663.

BURKE, PETITIONER, VS. BADLAM, RES.

DOUBLE TAXATION—CONSTITUTION—MANDATE—STOCK—STOCKHOLDERS—BANKS—DEPOSITORS—DEPOSITORS—CORPORATIONS—CERTIFICATE—SHARES—TRUSTEE. The Constitution requires or authorizes double taxation, but clearly forbids a corporation for all of the property of every kind including its franchise, and individual stockholders for shares of stock held by them, is double taxation. To tax banks all of their property, including all moneys deposited by depositors, and also to the depositors the respective deposited by them, is double taxation. If all the property of a corporation is assessed to it, and the tax thereon taxing the same property twice to impose a tax upon for the proportionate amount of shares held by each stockholder, the rights of a stockholder are confined to the property of the corporation. The stock of a corporation consists of such other property as the corporation may own. When such other property is assessed, the stock is assessed. The property of a corporation is assessed to it and the tax paid by the stockholders. The property of a corporation is assessed to the stockholders, who are the beneficial owners in proportion to the amount of shares held by each. The power to declare that property held in trust shall be assessed to the trustee. The ordinary relation of debtor and creditor between a savings bank and a depositor. To tax a property in the State more than once would not be taxing in the State in proportion to its value, as required by Article XIII, of the Constitution. In the absence of contrary, the presumption is that an officer has or has not official duty.

Winans, Bergin, Newlands, Campbell, Tobin, and others, for respondent.

Trehane, for petitioner.

Ross, J., delivered the opinion of the Court.

In this case we are asked by the petitioner to require himself to be a taxpayer of the City and County of San Francisco, to grant a writ of mandate compelling the said city and county to assess, upon the assets thereof, to various holders of certificates of stock in corporations, the respective shares held by them, and to assess the various depositors in various savings banks the respective sums of money deposited by them. The Assessor has or has not assessed to the respective

all of their property of every character, and to the respective savings banks all of theirs, including all moneys deposited with them, does not appear from the petition; but the Legislature has required the Assessor to do these things, we must presume that he has or will perform his duty in this respect in due time.

The claim of petitioner, however, we understand to be: That the Assessor must assess to the respective corporations all of their property of every kind, including franchise, and to the individual stockholders thereof their respective shares of stock held by them; and must assess to the respective savings bank all of their property, including moneys deposited with them by depositors, and also to the individual depositors the respective sums of money so deducted by them.

If this would, in effect, be assessing the same property for the same tax, it cannot be done. The Constitution of the State does not require or authorize double taxation. To the contrary, its language clearly forbids it. Thus: "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." (Section 1, Article I.) To tax a portion of the property more than once would certainly not be taxing all of it in proportion to its value.

A mortgage or trust deed securing a debt is, under the Constitution, to be deemed and treated as an interest in the property affected thereby, and assessable to the owner. The property itself is also to be assessed to its owner; but to prevent what would otherwise be double taxation, the Constitution requires that, in making the assessment, the value of the security shall be deducted from the value of the incumbered property. (Sec. 4, Art. XIII.) So in the case of property not secured by mortgage or trust deed, the Legislature may provide that there shall be deducted therefrom the amount due to *bona fide* residents of the State. Not only does the language of the Constitution neither require nor permit double taxation, but we think it may be safely said that neither the framers of the instrument nor those who ratified it ever supposed that under its provisions there could be any such thing; for both in the debates on the floor of the Convention which framed it, and in the arguments of those who advocated its adoption before the people, are to be found repeated disclaimers of any such intention.

But the important question remains, would what the petitioner asks to have done be, in effect, assessing the same

property twice for the same tax? The section of the constitution which declares that all property in the State exempt under the laws of the United States, shall be exempt in proportion to its value, to be ascertained as provided, also declares: "The word 'property' as used in this section is hereby declared to include mortgages, bonds, stocks, dues, franchises, and all other things, real, personal and mixed, capable of being taken in pledge; provided that growing crops, property used for public schools, and such as may belong to the United States, this State, or to any county or municipality within this State, shall be exempt from taxation." The legislature may provide, except in the case of credits, a mortgage or trust deed, for a deduction from credits due to *bona fide* residents of this State."

Now, what is the stock of a corporation, but the franchise—consisting of its franchise and such other property which a corporation may own? Of what else does its stock consist? If all this is taken away what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—its franchise and all of its other property—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with. The property is held by the corporation in trust for its stockholders, who are the beneficial owners of it in portions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation—nothing more. When the property of the corporation is assessed to it and the tax thereon paid who but the stockholder pays it. It is true it is paid from the property of the corporation before the money therein is divided among the stockholders substantially the same thing as if paid from the property of the individual stockholders. To assess all of the property of the corporation, and also to assess the property of the stockholders the number of shares held by him is necessary. It is manifest, be assessing the same property twice—once aggregated to the corporation—the trustee of all the stockholders; and again, separately, to the individual stockholders in proportion to the number of shares held. As well might it be contended that the property of the partnership should be assessed to the firm, and in addition to the interest of each partner in the firm property should be assessed to him individually. If I have an interest in

erty, my interest therein is property. It is the right. I e to share in the profits and property of the firm in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of the partnership, take away all the property of the firm, and I am no longer any property as a partner. In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property. The cases are parallel. If in one case it is competent to assess to the corporation all the property held by it, and to the individual stockholders their respective interests owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each individual partner his interest therein. It is clear to our minds that in the one case the partner, in the other the stockholder, would be compelled to pay taxes on the same property, which is neither required nor permitted by the Constitution. In the case of the corporations to which we have referred, the Legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the Constitution itself, of course could not do so if it had. It has only said that property shall be assessed to the corporation and shall be again assessed for the same tax. This it had the right to say. (*State of Maryland vs. C. & P. R. Co.*, 40 Md. 385; *State vs. Brannan*, 3 Zabriskie, N. J., 485; Angell & Ames on Corp. 460.) In the case of the savings banks, it has declared that all moneys deposited with them shall be assessed to the banks and not to the depositors. These moneys are held by the banks in trust for the depositors. Civil Code, Sections 517, 577; Hillard on Taxation, p. 31; *Livingston vs. Savings Banks*, 6 Otto, 388; *Colte vs. Society for Savings*, 32 Conn., 173; *Bunnell vs. Savings Society*, 38 N. H. 203; *Com. vs. People*, 5 Allen, 428), and, if assessed to the trustee and also to the *cestuis que trust*, would present a clear case of double taxation. Between the bank and the depositor the ordinary relation of debtor and creditor does not exist. (Civil Code, Secs. 517, 577, 1,912, 309, 579, and authorities *supra*.) It was clearly within the power of the Legislature to declare to whom the property should be assessed.

Demurrer sustained and writ denied.

We concur: Sharpstein, J., McKee, J., Thornton, J.

CONCURRING OPINIONS.

I concur in the judgment, and, in the main, expressed in the foregoing opinion. In my view it is not necessary to decide whether the Legislature (the present Constitution) has power to impose what is called "double taxation." The Constitution provides that "stocks" and "franchises" shall be included in "property," and that all property shall be taxed in proportion to its value." But the Constitution does not say that stocks or franchises shall be twice taxed. The aggregate value of all the shares of stock is taxed, as is the real and personal property and the franchises ordinarily included in the tax; certainly where the franchise and other property are taxed to the same extent as everything required by the Constitution to be taxed, and this whether one of these subjects of taxation is included in the others or not. The statute provides that shares shall not be assessed to the holders. Why should they if the "property" which is assessed to the corporation includes the anticipated profits from the enjoyment of the franchise, and all other elements of value which contribute to the value of the shares of stock? The suggestion is that the statute is unconstitutional because it does not provide for taxing the shares of stock both to the corporation and to the individual holders. But I find no such requirement in the Constitution. I think the demurrer should be overruled because the scope and purpose of the petitioners' bill is to compel the Assessor to perform an act which the Constitution does not command and which the statute prohibits. Morrison, C. J.

I concur in the views of Mr. Justice Ross so far as they relate to assessments to savings banks and depositors. I am of opinion that money deposited in savings banks should be assessed but once—either to the bank or to the depositor, and not to both. On the other question in the case (the taxation of shares of capital stock), I express no opinion: Morrison, C. J.

I concur in the views expressed by Mr. Justice Ross except as to the assessment to depositors of money in the savings banks named in the petition. Upon that subject I express no opinion: Myrick, J.

[Filed May 25, 1881.]

No. 10,627.

PARTE STEFFANO CASSINELLO, ON HABEAS CORPUS.

NANCE—POLICE POWER—NUISANCE—DUMPING PLACE—CONSTITUTION.

The ordinance passed by the Board of Supervisors of San Francisco, "no person shall throw into or deposit upon any public street, highway or grounds, or upon any private premises, or anywhere, except in such places as may be designated by the Superintendent of Public Streets and Highways, any glass, broken ware, dirt, rubbish, garbage or filth," is not oppressive, unjust or unreasonable, nor opposed to the provisions of Sections 1 and 21 of Article I of the State Constitution. The Board of Supervisors of San Francisco have, under the Act of March 25, 1863, the power to direct the summary abatement of nuisances, in the exercise of the police power; and the delegation of such power is in very large and general terms conferred by the provisions of Section 1, Article XI, of the present Constitution: "Any county, city, etc., may make and enforce within its limits, all such local, police, sanitary and other regulations, as are not in conflict with general laws." The complaint against the petitioner charged that he "did willfully and unlawfully, throw into and deposit upon certain lands at Channel and Fifth streets, in said city and county (San Francisco), a large quantity of broken ware, dirt, rubbish, garbage and filth; the said place where the same was thrown and deposited not being a place designated for that purpose by the Superintendent of Public Streets and Highways of said city and county": *Held*, sufficient.

D. Spivato and *M. Mullany*, for petitioner,

O. L. Smoot, contra.

MORRISON, C. J., delivered the opinion of the Court:

On the eighteenth of July, 1880, the Board of Supervisors of the City and County of San Francisco passed the following order:

Section 47. No person shall throw into or deposit upon any public street, highway or grounds, or upon any private premises, or anywhere except in such place as may be designated for that purpose by the Superintendent of Public Streets and Highways, any glass, broken ware, dirt, rubbish, garbage or filth," and the penalty prescribed for a violation of the order was a fine not exceeding one thousand dollars, imprisonment not exceeding six months, or both such fine and imprisonment.

In pursuance of the above order, the Superintendent of Public Streets and Highways designated the line of Sixth street, south of Channel, as a "dumping place," or place of deposit.

On the second day of February, 1881, a complaint was

filed in the Police Judge's Court of said city charging that the petitioner "did willfully and throw into and deposit upon certain lands at Chan streets in said city and county, a large quantity of ware, dirt, rubbish, garbage and filth; the said the same was thrown and deposited not being a nated for that purpose by the Superintendent of Streets and Highways of said city and county." Complaint there was a trial and conviction.

It is claimed, in the first place, that the foregoing is insufficient, and that it charges no offense. It is very clear, however, that the complaint charges the petitioner with a violation of the order of the Board of Supervisors referred to above; and the only remaining question relates to the validity of that order. Numerous objections have been made to it, such as that it is oppressive, unjust, unconstitutional, and also that it is unconstitutional.

The provisions of the Constitution, which, it is claimed, are violated by the order, are Sections 1 and 21. But I am unable to discover any application of the constitutional provisions referred to have to the order.

The objections that the order is oppressive and unreasonable are, in my opinion, not well taken. The presence of rubbish, garbage and filth are in their nature too plain to admit of controversy; and that glass ware can be very easily converted into nuisance about promiscuously, is equally plain.

By the Act approved April 25, 1863, power was given upon the Board of Supervisors "to authorize and to make a summary abatement of nuisances; to make all orders which may be necessary or expedient for the preservation of the public health and the prevention of contagion; to provide by regulation for the prevention and removal of all nuisances and obstructions in the streets, highways and public grounds of said city and county."

But the delegation of police power to the Board of Supervisors by the Constitution also is in very large terms. Section 11 of Article XI is as follows: "Every city, town or township may make and enforce all ordinances and regulations not in conflict with the limits all such local, police, sanitary and other laws as are not in conflict with general laws." No restriction has been made to any general law on the subject, and I am aware of the existence of any statute which attempts to regulate the matter now under consideration, except the Act of 1863.

making of the police power, in the case of *Commonwealth v. 7 Cushing*, 85, Shaw, C. J., says: "The power we to is rather the police power—the power vested in the nature by the Constitution to make, ordain and establish manner of wholesome and reasonable laws, statutes ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the and welfare of the commonwealth, and of the subjects same. It is much easier to perceive and realize the and sources of this power than to mark its boundaries prescribe limits to its exercise."

Redfield, C. J., delivering the opinion of the Supreme of Vermont, in the case of *Thorpe vs. The Rutland Burlington Railroad Company*, 27 Vermont, 149, says: police power of the State extends to the protection of es, limbs, health, comfort and quiet of all persons, and protection of all property within the State."

Supreme Court of the United States, in the *Slaughter cases*, 16 Wallace, 62, uses the following language: power here exercised by the Legislature of Louisiana its essential nature, one which has been, up to the t period in the constitutional history of this country, led to belong to the States however it may now be oned in some of its details. * * * The power is, and be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social the life and health of the citizens, the comfort of an nce in a thickly populated community, the enjoyment rate and social life, and the beneficial use of property." earned Judge was here speaking of the Act of the Legislature of the State of Louisiana, passed March 8, 1869, nning and regulating slaughter houses.

ll content myself with a reference to one additional ity on this subject, and that is the case of *Ex parte er on habeas corpus*, reported in 33 Cal. 279. In that e petitioner was convicted, in the Police Court of the nd County of San Francisco, of keeping and maintain- slaughter house within certain limits, in violation of an of the Board of Supervisors. The order was framed suance of the Act of 1863, already referred to. The there say: "By its first section the Board of Super- of the City and County of San Francisco is author- among other things, 'to make all regulations which e necessary or expedient for the preservation of the e health and the prevention of contagious diseases.' * * It is apparent that the Legislature could confer

power upon the Board to pass the order if enacted it directly in the form of a statute in substance. The real question to be determined, then, is the power of the Legislature to legislate on public health is so narrowed by constitutional provisions it cannot regulate the business of slaughtering in populous towns by limiting its prosecution to packing houses or quarters therein. We must hold in favor of the power, unless its unconstitutionality is clearly shown. *vs. Hildreth*, 26 Cal. 162.)" The order was sustained by the Court, and the prisoner was remanded.

It is very clear to me that the authority to pass the order now under consideration was vested in the Board of Supervisors by the Act of April 25, 1863; but if there is room for doubt, the clause in the Constitution (Article XI) is too plain to admit of more than one construction: "Any county, city, town or township may enforce within its limits all such local, police or other regulations as are not in conflict with the Constitution. Here we have the authority clearly and expressly conferred by the organic law of the State, and that it is not to be denied will admit of no doubt.

The regulation in this case, instead of being unreasonable or unjust, was a wise and salutary one to promote the welfare and best interests of the community. It was, in its nature and purpose, a salutary police regulation designed to protect the safety and health of the people of the city of San Francisco.

The writ is dismissed and the petitioner remanded.

IN BANK.

[Filed May 27, 1881.]

No. 7750.

FOX, RESPONDENT, vs. LINDLEY, APPELLANT.

SHORT-HAND REPORTERS—FEES—JUSTICES' COURT—MAYOR'S OFFICE—TREASURER—CERTIFICATE. Short-hand reporters are entitled to fees under Section 869 of the Penal Code, as amended, for services rendered before a Justice of the Peace, or a committing magistrate. Mandamus will not lie to a County Clerk to compel him to pay out money upon a certificate, signed by a Justice of the Peace, for reporter's fees, under Section 869 of the Penal Code.

Appeal from Superior Court, Los Angeles County.

McConnell & White, for respondent.
Thomas B. Brown, for appellant.

KEE, J., delivered the opinion of the Court:

This is an appeal from an order for a peremptory writ of *habeas corpus* to compel the Treasurer of Los Angeles County to pay the respondent certain fees, for taking down the testimony and proceedings in a criminal proceeding before a Justice of the Peace, pursuant to the provisions of Section 869 of the Penal Code, as amended March 3, 1881.

It is admitted that the respondent was regularly appointed a Justice of the Peace to perform the services required; that the services were rendered; and that the committing magistrate certified them according to the provisions of the Penal Code. But when the respondent presented his demand, according to law, to the County Treasurer and demanded payment, the Treasurer refused to pay, not because for want of funds in the Treasury, but because the demand itself was not authorized by law.

When this is answered that subdivision 2 of Section 869, of the Penal Code, provides that "the reporter's fees shall be paid out of the treasury of the county, or the city and county, on a certificate of the committing magistrate." But are such fees allowed by law to short-hand reporters appointed by the provisions of Section 869 of the Penal Code? If the Treasurer cannot be compelled to pay the demand of the respondent; for it is made his duty to "disburse the county moneys only on county warrants issued by the County Auditor, based on orders of the Board of Supervisors, or as otherwise provided by law." (Subdivision 6, Section 4144, of the Penal Code.) Now the law under which the respondent was appointed did not, in any of its provisions, prescribe any compensation for reporters for services rendered under it; nor did it authorize the magistrate who appointed the reporter to fix the fees or compensation to which he might be entitled for his services. In fact there is no law at all which allows compensation or fees to short-hand reporters, except it be Section 4144 of the Political Code, which provides a salary for the stenographic reporter of the Supreme Court, and Section 4145 of the Code of Civil Procedure, which prescribes the compensation or fees to which reporters are entitled for services rendered in the trial of civil actions and proceedings, in criminal cases, in Courts of record. But those sections have no application to short-hand reporters generally. Section 4144 of the Code of Civil Procedure applies only to official reporters appointed by Superior Courts, and acting

under their oath of office, in accordance with the provisions of Sections 272 and 273 of that Code. There is no provision in Section 869 of the Penal Code which authorizes a magistrate appointed under it to charge for his services, or for the expenses as are allowed by law to official reporters of the Court. Nor is there anything which authorizes a magistrate to fix his fees or compensation according to the circumstances, or at all.

In the absence of any law prescribing the compensation of a respondent was entitled to charge for his services. The certificate of the magistrate that the services were rendered does not constitute a demand upon the County Treasurer. The Treasurer was bound in law to pay.

Judgment and order for a peremptory mandamus.

We concur: Myrick, J., Ross, J., Sharpsteen, J.,
son, C. J., Thornton, J.

IN BANK.

[Filed May 24, 1881.]

No. 7806.

BARTHOLD ET AL., PETITIONERS

VS.

SULLIVAN, JUDGE OF THE SUPERIOR COURT,
RESPONDENT.

MANDAMUS—EXECUTION—APPEAL—BOND—PRACTICE. Mandamus to compel the Judge of the Court below to fix a bond to stay proceedings pending an appeal from a judgment of execution upon a judgment in ejectment, and to issue a writ of execution upon a judgment in ejectment, and to appear that the judgment upon which such writ had already been affirmed by the Supreme Court.

By the COURT:

The petition in this cause shows that the writ was properly issued in *Charles McLaughlin vs. Hebert and Albert Barthold*. This writ was issued as the judgment had been affirmed on appeal. We cannot say that the Judge of the Superior Court of the City and County of San Francisco has denied any right to which the petitioner is entitled, or that he has failed to perform any duty which the law enjoins upon him as a duty resulting from his office, which he is the incumbent. The petitioners show that they are entitled to the writ of mandate. The writ is denied, and the proceedings dismissed.

DEPARTMENT No. 2.

[Filed May 31, 1881.]

No. 7115.

STEINBACH ET AL., RESPONDENTS,

VS.

NORWOOD ET AL., APPELLANTS.

TRUST DEED—AGREEMENT. Ejectment by plaintiffs. The latter were Trustees, and the rights of the parties defendant depended upon the agreement following: "Said Trustees shall sell to Mahlon Thorne and such nine other persons as he may in writing designate, within six months after said Trustees shall have notified him, said Thorne, at which they have fixed the prices at which they will commence selling the lots and subdivisions of said lands, or certain portions thereof, such of said lots or subdivisions as he or either of them desire to purchase, not exceeding to each one respectively the value of three thousand dollars (\$3,000), gold coin, as so fixed, or as may be fixed by them from time to time after said notification, and shall accept, in payment therefor, notes of said purchasers, secured by mortgage on the land so sold to them respectively, the principal payable in gold coin of the United States, on or before April 1, 1883, bearing interest like gold coin, at the rate of ten per cent. per annum, payable annually, and compounding annually; but nothing herein contained shall prevent said Trustees from selling to other parties all or any portion of said lands after the expiration of ten days after said notification." The defendants were the persons designated. *Held*, that as plaintiffs were to subdivide lands and fix the prices, that defendants, if they wished to purchase specific tracts, must purchase according to the prices and subdivisions so fixed and made.

deal from the First District Court of Ventura County.

J. Brooks, for respondents.

J. Williams & Williams and A. W. Thompson, for appellants.

THE COURT:

was an action of ejectment, and the defense was that defendants were the equitable owners, and were entitled to the conveyances of specific tracts of land within the tract sued for. Their right depends upon the proper action of Article VI, of the declaration of trust under which plaintiffs acquired the title, which article is as follows: "Said Trustees shall sell to Mahlon Thorne and such nine persons as he may in writing designate, within six months after said Trustees shall have notified him, said Thorne, at which they have fixed the prices at which they will commence selling the lots and subdivisions of said lands, or certain portions thereof, such of said lots and subdivisions

as he or either of them desire to purchase, no each one respectively, the value of three thousand (\$3,000) gold coin as so fixed, or as may be from time to time after said notification, and a payment therefor notes of said purchase and mortgage on the land so sold to them respectively payable in gold coin of the United States April 1st, 1883, bearing interest, in like gold rate of ten per cent. per annum, payable annually; but nothing herein contained prevent said Trustees from selling to other part portion of said lands after the expiration of said notification."

Plaintiffs are the Trustees, and the defendants persons designated. The Trustees subdivided into twenty-seven parcels or subdivisions, and to each parcel; Subdivision No. 1, the larger at \$100,000; the others at various sums down to defendants claim the right to take, of Subdivision portion to each in such measure and at such the portion of each, respectively, shall be \$3 that the portions of Subdivision No. 1 which selected be set off to them, or if there be do measurement and valuation, the Court cause measured and valued.

By the terms of article six of the declaration Trustees (plaintiffs) were to subdivide the real prices; they appear to have done so; and it seems the defendants, if they wish to purchase specific must purchase according to the prices and so fixed and made.

Judgment and order affirmed.

Facetiae.

THE following are the concluding words of the brief in a suit against a husband for goods furnished upon his credit:

"She [the wife] has not been shown to be a scoundrel, or a swindler, and the presumption is were put to their proper use, and that whenever puts his arm about her he embraces some of the when he slumbers at night his head rests on a charged in this bill, and furnished, for aught to the faith and credit of the community property."

Pacific Coast Law Journal.

VII.

JUNE 18, 1881.

No. 17.

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PACIFIC COAST LAW JOURNAL,
538 Sacramento Street, S. F.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed May 20, 1881.]

No. 6830.

LE CONTE, RESPONDENT,
vs.

TOWN OF BERKELEY, APPELLANT.

PROHIBITION—MINISTERIAL OFFICER. The writ of prohibition will not be issued against the acts of a ministerial officer.

Appeal from Fifteenth District Court, San Francisco.

John B. Mhoon, for respondent.
Clark & Whitworth, for appellant.

By the COURT:

The writ of prohibition does not run to a ministerial officer. Acts sought to be prohibited were not judicial acts, and therefore the writ of prohibition which was issued in this case on the twenty-sixth day of August, 1879, was improperly issued.

The judgment reversed and cause remanded.

IN BANK.

[Filed May 27, 1881.]

No. 10,594.

PEOPLE, RESPONDENT, VS. NELSON,

BURGLARY—FELONY—INFORMATION—CRIMINAL LAW—D

There is no such distinctive crime as felony. crimes, any one of which is a felony. An informant must allege the larceny or specific felony which the defendant intended to commit. *Held*, accordingly, that an information charging the crime of burglary was committed as follows: The defendant lawfully, feloniously, and burglariously did forcibly enter the apartment of one A. * * with the intent then and there to commit a felony," etc., is fatally defective, the facts state the commission of a public offense. An information charging facts sufficient to constitute a public offense, does not conform to the requirements of the Penal Code, and such last ground is not required.

Appeal from Superior Court, Colusa County

Attorney-General Hart, for Respondent.*Howard, Burkhalter, and Hutch*, for Appellant.

SHARPSTEIN, J., delivered the opinion of the court.

The appellant was tried, convicted, and sentenced to prison on an information, of which the following is a copy:

"T. J. Hart, District Attorney for said County of Colusa, State of California, here in open Court, by the filing of this 13th day of September, one thousand eight hundred and eighty, informs this Honorable Court that the crime of burglary was committed by Samuel Nelson, Charles Vickers, and James Herbert, as follows: Samuel Nelson, Charles Vickers, and James Herbert, do hereby accused by the said District Attorney for said County, of the crime of burglary, committed on the 1st day of August, eighteen hundred and eighty, in the County of Colusa, and State of California, unlawfully, feloniously, and burglariously, did forcibly enter the apartment of one G. W. Miller, with the intent then and there to commit the crime of felony, to the form, force, and effect of the statute in such case provided, and against the peace and dignity of the State of California."

This appeal is from the judgment and the denial of the defendant's motion for a new trial.

It is claimed on behalf of the appellant

d in the information do not constitute a public offense. If they do not, the judgment must be reversed.

The only question which arises upon this point is whether the information charges the defendant with the commission of the crime of burglary. The Penal Code declares that every person who, in the night time, forcibly breaks and enters, or without force enters through any open door, window or other aperture, any house, room, apartment, or tent, or any tent, vessel, water craft, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary." (P. C., 459.)

The charge in the information that the accused "unlawfully, feloniously, and burglariously did forcibly enter" the house of the person named, "with the intent then and there to commit the crime of felony," sufficient? In other words, does it charge the commission of the crime burglary?

There is no such distinctive crime as felony. There are many crimes, any one of which is a felony. These are all defined in the Penal Code. When it is said that a person committed a felony, it is equivalent to saying that he has committed some one of several crimes. A charge that a person entered a house with the intent to commit a felony, could be supported by proof that he entered it with the intent to commit a burglary, because a burglary is a felony. It probably never occurred to any one that a charge that a person had entered a house with the intent to commit the crime of burglary would be sufficient, or that a conviction on such a charge could be sustained.

The only material difference between the definition of burglary as given by Coke, Hawkins, and Blackstone, and that given by our Code, is that the latter makes it burglary to enter a house with intent to commit petit larceny, as well as to commit a felony.

It is unnecessary to state that under the late rules applicable to criminal pleading, this information would have to be held to be fatally defective. "But," as was said in *People v. Davis* (14 Cal. 30), "our statutes have relieved the administration of criminal law of a good deal of unnecessary technicalness of the English forms of criminal pleading. An indictment is good here if it give a statement of the acts constituting the offense in ordinary and concise language, in such a manner as to enable a person of ordinary understanding to know what is intended. It must be direct and certain as to the party charged, the offense charged, and the particular circumstances of the offense charged, when such facts are necessary to constitute a complete offense."

The circumstance that the accused entered intent to commit petit larceny or some felony, and it was necessary to allege in this information. It is necessary to allege an intent to commit a specific offense. It has uniformly been held that where an indictment alleges an intent to commit one felony, and the proof shows an intent to commit another and different felony, the error is fatal. But if the allegation of this intent is immaterial, it would seem that such variance might be immaterial. The difference between being misled wholly in the dark, in regard to the charge which the prosecution might prove, is scarcely appreciable.

It is urged, however, on behalf of the People, that the objection could only have been taken advantage of by demurring on the ground that the information "does not substantially conform to the requirement of Sections 952" of the Penal Code, and that by failing to do so, the defendant waived the objection. It is true that ground the defendant waived the objection, but the blush that appears plausible enough, but it will not stand the test of a careful examination. An indictment which does not state facts sufficient to constitute a public offense would not substantially conform to the requirement of those sections; and yet it could not be objected to on that ground. The objection that "the facts stated do not constitute a public offense" would be waived by not demurring to the indictment on the ground that it did not substantially conform to the requirement of those sections. And we can easily perceive that a complaint, which substantially conforms to the requirements of those sections, would be valid upon any ground. If the facts stated in this information do not constitute the public offense of which the defendant was convicted, the judgment ought not to be disturbed on any ground which we are now considering. But if the facts stated do not constitute a public offense, the judgment should be reversed; and as it appears to us that the defendant was convicted of an offense with which he was not charged in the information, it follows that the conviction cannot stand.

A large number of exceptions were taken to the information, charge, and instructions by the Court, which were sustained in a bill of exceptions and made the basis of a new trial, which was denied; but the conclusion reached by this Court renders it unnecessary to pass upon the exceptions.

Judgment and order denying a new trial affirmed, and the cause remanded.

We concur: Morrison, C. J., McKinstry, J., Thornton, J.

DEPARTMENT No. 2.

No. 7472.

LTON LAND AND WATER COMPANY, APPELLANT,

VS.

P. A. RAYNOR ET AL., RESPONDENT.

TICE—CROSS-COMPLAINT—REPLICATION—ANSWER—MORTGAGE—DEED—
 FRAUD—DECREE. No replication is required under our procedure.
 The answer to a cross-complaint is deemed controverted by the op-
 posite party. Matters which relate to and are connected with the
 subject of the action are the proper subject of a cross-complaint. Case
 stated where the facts show a plain and palpable fraud by plaintiff on
 the rights of defendant, and show that defendant is entitled to have
 an instrument executed by him declared to be a mortgage simply, and
 for an accounting. Form of decree in this case given.

Appeal from the Eighteenth District Court, San Ber-
 nardino County.

Runson & Wells, Boyer and Estee & Boalt, for appellant.

Maris & Allen, and Littlepage and Bennett & Wigginton,
 respondent.

By the COURT:

In the above entitled action this Court doth order and ad-
 judge that the decree of the Court below be modified so as
 to read as follows:

This case coming on to be heard on the 3d day of April,
 1879, before the Court and without a jury, all parties in in-
 stant being represented by their respective attorneys, and
 testimony for the plaintiffs, defendant Raynor, and for Wm.
 Mintzer, J. C. Peacock, W. R. Fox, James Cameron and
 Rose Hunt, parties impleaded in this case, and each and
 all parties having rested and announced to the Court that
 they had no further testimony to introduce, then after argu-
 ment of counsel, the Court being fully informed upon all
 facts made by the respective parties hereto, on the 24th
 day of October, 1879, filed its findings of fact and conclu-
 sions of law in the premises.

Therefore, pursuant to the findings of fact and conclu-
 sions of law heretofore filed in this case:

It is ordered, adjudged and decreed, that plaintiff take
 nothing in this action and that the injunction heretofore
 granted in this case be, and the same is dissolved.

It is further ordered, adjudged and decreed, that plaintiff

execute to defendant, P. A. Raynor, a good conveyance to an undivided four-sevenths of the and water rights described in plaintiff's complaint. Defendant P. A. Raynor's cross-complaint, that undivided four-sevenths of all that certain property in the county of San Bernardino, State of California. Those tracts of land on the Rancho of San Bernardino and designated on the plan of survey of said land of which is on record in the Recorder's office as lots five (5), six (6), seven (7), eight (8), of eighty (80), also the whole of block number eighty and the whole of block number eighty-two north half of lot-eight (8), all of said land being acre survey, and containing fifteen hundred acres less; also lot two (2) of fractional block eighty save the two acres heretofore conveyed by W. H. school lot; also the entire fractional blocks ninety (90) and ninety-one (91), being about four hundred acres of said described land in fractional block aforesaid land being that which was conveyed to P. A. Raynor, W. H. Mintzer, J. C. Peabrose Hunt by deed of date May 23, 1874, and Book 'O' of Deeds of the Recorder's office on page 290; also that tract of land on the Rancho bounded and described as follows: Commencing on the township line between ranges four and twenty chains north of the San Bernardino base twenty chains north of the corner of township one south, ranges four and five west; thence twenty chains; thence south thirty-four chains or less, to the southwestern boundary line of the Rancho; thence southeasterly along said boundary point forty chains east from the aforesaid township between ranges four and five, as aforesaid; thence chains to a stake two by three inches thick set chemise brush; thence, continuing north, six mound of stone; thence west twenty chains to mound of earth; thence north twenty chains to stone; thence west twenty chains to the intersection township line, aforesaid, between ranges four thence south along said township line forty place of beginning; containing about two hundred being the same land conveyed to Wm. H. Raynor, W. R. Fox, Ambrose Hunt, J. G. James Cameron by John Hancock and Margaret their several conveyances dated April 22, 1878.

; also including all rights and privileges to water rising flowing on said Rancho Muscupiabe, and all appurtenances appertaining to the property last described; also the following described portions of the said Muscupiabe Rancho conveyed to P. A. Raynor, W. H. Mintzer, J. C. Peacock, R. Fox, Ambrose Hunt and James Cameron by Joseph Ward, by conveyance dated June 29, 1875, recorded in 'R' of Deeds, page 156, to-wit:

Commencing at a point sixteen chains fifty links north of common corner of township one (1) north, one (1) south, one (1) east and four (4) and five (5) west, San Bernardino meridian; thence running east twenty chains; thence south thirteen chains; thence north $64^{\circ} 15'$ west, twenty-two chains four links to the place of beginning, and being the southwest corner of section thirty-one (31), in township one north, one (1) east and four west, according to the subdivision of said township and containing sixteen acres of land, more or less; and excepting from the above described property such portions thereof as had been sold and conveyed by plaintiff to the said P. A. Raynor, W. H. Mintzer, W. R. Fox, Ambrose Hunt, J. C. Peacock and James Cameron, to-wit: Two one-half acres of said land conveyed to M. A. Murphy, on September 11, 1877; also one and three-fourths acres of said land conveyed to A. Thompson, of date October 24th; also one and three-fourths acres conveyed to J. H. Moulton, on September 11, 1877; also ten acres of said land conveyed to B. F. Garner, of date November 20, 1877; also 9-100 acres of said land to B. F. Garner, of date January 1878.

There shall be and is included in this exception all of the above described lands sold by the aforesaid Mintzer, Fox, Peacock and Cameron subsequent to the execution of the deed of the 12th of October, 1875, made by Raynor to the said Mintzer, Fox, Hunt, Peacock and Cameron, and all of said lands sold by the plaintiff since the execution of the deed to it by the parties just named, the purchase money of which sale or sales has been accounted for in this return.

It is further ordered, adjudged and decreed, that upon the return of plaintiff herein to make and execute to defendant, P. A. Raynor, a good and sufficient conveyance to him of the best interest in the property herein decreed to be conveyed, after thirty days' notice and demand by said P. A. Raynor upon it, the plaintiff, to so execute such conveyance, then James W. G. Esq., may make and execute such conveyance, and he is hereby appointed a Commissioner with full power and

authority to make such conveyance in case of pl
ure to do so.

"It is further ordered, adjudged and decreed,
ant, P. A. Raynor, is an owner of an undivided f
interest in the contract with the Western I
Company.

"It is further ordered, adjudged and decreed,
ant, P. A. Raynor, have and recover of W. H.
R. Fox, J. C. Peacock, Ambrose Hunt and Jam
the sum of three hundred and fifty-three 70-100
that he have execution therefor.

"It is further ordered, adjudged and decreed,
ant, P. A. Raynor, have and recover of the C
and Water Company, plaintiff herein, the sum o
sand seven hundred and ninety-five 64-100 dolla
he have execution therefor, to be satisfied out o
property held by said plaintiff, except the four-
terest adjudged to be conveyed by it to said de
A. Raynor, and that said P. A. Raynor, defend
costs herein against the plaintiff and said W. H.
C. Peacock, W. R. Fox, Ambrose Hunt and Jam
taxed at four hundred and four and 95-100 dolla
execution therefor."

And as to all other matters that the decree
and that the order denying a new trial be also at

This Court doth further order that this decree,
be remitted to the Court below, which Court is
enter it, on its records as the decree in this caus

DEPARTMENT No. 2.

[Filed May 31, 1881.]

No. 7472.

COLTON LAND AND WATER COMP

VS.

P. A. RAYNOR, ET AL.,

THORNTON, J., delivered the opinion of the Co

A demurrer on various grounds was interp
amended cross-complaint of Raynor. We hav
this cross-complaint carefully, and we cannot p
error in the Court's overruling the demurrer to i
a case clearly demanding the interposition of the

It is objected that the evidence allowed in regard to Exhibit B was improperly admitted. The paper referred to is these words:

For value received, I hereby sell and assign to Wm. Mintzer, J. C. Peacock, W. R. Fox, and James Cameron my right and interest in the within instrument and contract.

"P. A. RAYNOR.

February 25, 1876."

The instrument and contract referred to in this Exhibit B is one executed by the aforesaid Mintzer, Peacock, Fox, and Cameron with one Ambrose Hunt, by which they agreed to reconvey to Raynor, on conditions therein named, certain lands, water rights and privileges which, on the previous day, had been conveyed by Raynor to the parties just above named. In Raynor's cross-complaint the facts in relation to the two papers last named were set forth, and he claimed that they were but a mortgage. On this, issue was joined, and the above named Mintzer, Peacock, Fox, Cameron, and Hunt, in their answer to the cross-complaint, set up this last paper (Exhibit B) as an absolute conveyance to them by Raynor.

The defendant Raynor was asked if any consideration was paid to him by the parties to whom this paper was executed. This Raynor answered "No." The testimony was objected to on the ground that the consideration was not denied in the pleadings. The Court overruled the objection, and there was an exception.

What force there can be in this objection we cannot perceive. The paper was only set up in the answer to the cross-complaint, at which stage, under our system, the pleadings terminate. No replication is required by our law of procedure. What opportunity did Raynor have to set up the fact of consideration in a pleading? He was not called on to allow to reply to the answer in which this document made its appearance. But what the defendant could do by an actual pleading, the law does for him under the clause of Section 462 of the Code of Civil Procedure—"the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the face of it, be deemed controverted by the opposite party." This has always been regarded as allowing a plaintiff, in reply to a new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in the replication and pleaded with all the precision and fullness required by the strictest rules of law ever required. (*Curtiss vs.*

Sprague, 49 Cal. 301.) The same rule applies to the cross-complaint. (C. C. P., Section 442.)

There is no error in the ruling referred to. The instrument was duly executed and due execution of the instrument was established by the evidence admitted.

We see no ground for the criticism made by the appellant as to finding fifteen. The words "in question," in the finding, are explained by reference to Exhibit B to the cross-complaint of the defendant Raynor. This Exhibit B, which is a conveyance of the property referred to in the finding, is described as being certain portions thereof as have been heretofore conveyed by the grantors or their predecessors in such parcels as are held and owned by any of the grantors separately." As we read the finding, the conveyance to plaintiff (Exhibit B), is incorporated in the finding as if the whole description were inserted with the finding referred to. We cannot therefore see any sound basis for the above stated criticism of the finding.

The sixth conclusion of law is expressed in the language, in which it is held that Raynor is entitled to have the plaintiff convey to him an undivided four-sevenths interest in the land conveyed by Raynor to Mintzer and O. C. Raynor-Roe deed of the 12th of October, 1875, subject to the mortgage. But certainly the Court did not intend that the plaintiff convey the parcels of land which it was found to have conveyed, and if it did so intend, no title to the land would pass under the decree or any conveyance subsequent to it. But when we come to the decrees, the exceptions are mentioned, out of the lands directed by the decree to be conveyed by plaintiff to Raynor, the Court might have determined, or had ascertained by reference to the specific lots of land remaining unsold, and decreed that the lots be conveyed to Raynor; but we cannot see how the appellants are prejudiced by the decree as drawn, since more can pass by any deed made under it than is now unsold.

The items of expenditure (in finding 18) on the land conveyed to the Western Development Company, and the profits thereof, did not enter into the account, and there was no error in the Court in excluding such items from the account. The lands referred to were conveyed by Raynor and his co-tenants to the W. D. Company by the Raynor-Roe deed. The interest of Raynor

t with the W. D. Company was conveyed to Mintzer and
ers, but this was a different matter from the lands con-
ed to this company. This contract is as follows: The
D. Company covenanted to and agreed, in consideration
conveyance to it by Raynor, Mintzer, Peacock, Fox,
eron, and Hunt, of 604 acres of land, a portion of the
Bernardino Ranch, for town site purposes, to pay to
parties, just above named (Raynor and others), in quar-
y payments, one-half of the net proceeds of the sale of
on the town site located on the tracts conveyed to said
pany; it being however agreed that the actual cost of
eys, map-making, publishing, advertising and printing,
sums paid for taxes and street assessments on said land,
d first be deducted from the moneys received for the sale
said lots, the balance to constitute the net proceeds.
ether the evidence was sufficient to justify finding 18
d not be considered, inasmuch as this finding relates to
expenditures and rents just above mentioned, which are
ely outside of any issue. These matters may form a
of a settlement of accounts between the parties above
tioned (Raynor, Mintzer and others), and the W. D.
pany, but we cannot see that they come into this ac-
rt.

he position that the judgment rendered in this action
d not be rendered on the pleadings cannot be sustained.
plaintiff's complaint against Raynor as sole defendant
forth that it is and has been a corporation ever since the
day of January, 1877; that on the 17th day of April,
5, Raynor and Mintzer, Peacock, Fox, Cameron and Hunt
e owners as tenants in common of certain lands situate
an Bernardino county, which said lands were incumbered
mortgage of date 23d of May, 1874, to one Conn as se-
ty for the payment of two notes for \$2,300 each, one ma-
g on the 11th day of December, 1874; and the other on
11th day of December, 1875. That on the 17th of April,
5, the above-named tenants in common conveyed a part
e lands first above mentioned to the Western Develop-
t Company, at the same time taking back the agreement here-
ter mentioned from the W. D. Company; that Raynor's
rest in the said lands is a four-sevenths undivided part,
his liability in regard to them in the same proportion;
at the time the first note to Conn matured all paid ex-
Raynor, who has never paid or offered to pay any por-
of it; that on the 12th of October, 1875, Raynor agreed
onvey to his said co-tenants all his interest in said lands
everything held by him and his co-tenants in common,

whether real or personal, including the interest in common with the co-tenants above named in said deed and agreement with the W. D. Company agreeing to assume and pay off all the amounts come due to Conn; and thereupon, in order to intention of the parties, Raynor, by Roe, his attorney executed to the said co-tenants a conveyance of in the lands aforesaid, but by mistake the conveyance did not specifically mention the interest of Raynor in the agreement with the W. D. Company, as was intended by the parties to have been done; that on the 17th day of March, 1877, the said co-tenants other than Raynor, with Davis, the owner of a mortgage thereon, conveyed to plaintiff all the property above described, with all the interest in the agreement with the W. D. Company; that the grantors performed all the conditions on their part in the contracts and transactions between them and Raynor; that Raynor claims that he has a right in the agreement with the W. D. Company, and that he is entitled to a portion of the profits received and to be received from the lands, etc., aforesaid, and that he is insolvent. The prayer of the complaint is that it be adjudged that Raynor has no title in and to any of the property, rights or interests in the lands aforesaid, or moneys or profits to be received from the W. D. Company, and that plaintiff is the sole owner of the property above, and, "if the Court deem it proper that the deed of October 12, 1875 (called herein the deed), be reformed so as more clearly to express the intention and contract of the parties aforesaid," and for costs and junction.

The defendant Raynor, by his amended cross-complaint which was filed against plaintiff and Mintzer, F. Hunt and Cameron (the five last named persons made parties to the action by order of the Court on August 5, 1878), set up certain equities against the parties just mentioned, which entitled him, if established, against the parties above, to relief, to an account and reconveyance of the lands remaining unsold in the action and interested. These matters related to and were connected with the subject of the action as set forth in the complaint and were the proper subject of a cross-complaint. The complaint affected the property to which the action related and was connected to the transaction on which the action was brought. P., Sec., 442; 2 Daniells Ch. Prac. 1548 *et seq.* Rem. and Rem. Rights, Secs., 734 *et seq.*, 741.

es cited in notes; Story's Eq., Sec. 389 *et seq.*, and cases ed.) The Court adjudged that these equities were established, and granted the relief to which they showed Raynor was entitled. In effect, the Court held that the equities were alluded to; existed in favor of Raynor against the equities referred to; that the plaintiff was not entitled to the relief which is asked, inasmuch as the facts set forth in the cross-complaint and proved by the testimony, established facts in Raynor which counter-vailed any claim to a decree which the plaintiff ever had. That the matters set forth in the cross-complaint justified a resort to such a remedy, we do not see any room for doubt. (See the works just above cited and the following cases: *Leavenworth vs. Parker*, 52 Cal., 132; *Gleason vs. Moen*, 2 Duer, 639; *Boston S. & W. Co. vs. Eull*, 37 How. Pr., 299; S. C. 6 Abb. N. S., 319; 1 Leamy 359.) The judgment rendered in this action was a proper one under the pleadings, the facts alleged having been established by proof.

In our opinion the findings are sustained by the evidence. They established a case of plain and palpable fraud on the part of Raynor, attempted to be carried out by means of a cloaked machinery of a corporation—a common resort in these days to accomplish a fraud; a course of conduct which deserves and should receive on every occasion when it appears before it, the rebuke of every department of the government, and unstinted public and private censure and condemnation. For an instance of such an attempt to carry out a fraud, see *Wardell vs. Union Pacific R. R. Co.*, recently decided (Oct. T., 1880) by the Supreme Court of the United States—opinion per Field, J.

We find no error for which the ruling of the Court below could be reversed; but the general language of the decree could be modified so as to add to the exceptions in it of lands not to be conveyed, the following words: "There shall be included in this exception all of the above described lands sold by the aforesaid Mintzer, Fox, Hunt, Peacock, and Cameron, subsequent to the execution of the deed of the 12th day of October, 1875, made by Raynor to the aforesaid Mintzer, Fox, Hunt, Peacock, and Cameron, and such lands sold by the plaintiff since the execution of the deed to it by the parties just named, the purchase money of which sale or sales has been accounted for in this account." With this modification, the judgment being otherwise correct, is affirmed, as is the order denying a new trial. We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed May 31, 1881.]

No. 7488.

CHRISTY, RESPONDENT, VS. FISHER, APPEALANT.

PATENT—EXECUTORS—LEGAL TITLE—CONVEYANCE—TENANT IN COMMON—EJECTMENT—DUTY OF PARTY TO PAY TAXES—PURCHASER'S TITLE NOT VOID BECAUSE ISSUED TO A PERSON AS EXECUTOR—SALE FOR TAXES ON HIS OWN PROPERTY. A patent for land in the United States is not void because issued to a person as executor, and as to a conveyance by him, it is immaterial whether he executes it in his representative or individual capacity. A tenant in common, holding an undivided tract of land is entitled to maintain ejectment for possession against a mere trespasser or intruder. A party who pays a tax on real estate cannot strengthen his title by paying the tax and becoming the purchaser at the sale for taxes.

Appeal from the Sixth District Court, Sacramento.

Martin & Jones and Catlin & Hamburger, for appellants; Taylor & Crosssett, for respondent.

MORRISON, C. J., delivered the opinion of the court.

The plaintiff brought an action of ejectment to recover the possession of certain real estate in the town of Colusa, described in the complaint as lots one to sixty, sixty-one to ninety-seven; and fractional lots fifteen and sixteen, and seventy-two, and obtained a judgment therefor.

On the trial of the case, a patent for the land in the United States to Halleck, Peachy and Van Winkle was put in evidence on the 27th day of June, 1864, was put in evidence by the plaintiff. On the 29th day of July, 1857, Halleck and Van Winkle conveyed block ninety-seven to one Gill, and on the same day they conveyed the other lots described in the complaint to one E. D. Hoskins. On the 1st day of June, 1861, said Hoskins conveyed the property purchased by him from Van Winkle to said Cole. On the 29th day of June, 1875, Cole and wife conveyed to Henry Donnelly, and on the 21st day of May, 1877, Donnelly sold and conveyed the property to the plaintiff Christy. Here we have a derangement of title from two of the patentees of the United States Government down to the plaintiff.

The introduction of the patent in evidence was held to be immaterial and irrelevant, for the alleged derangement of title from the parties to whom the patent was issued was held to be the heirs or executors of Joseph L. Folson.

does not positively appear in the transcript, that the intent was to them *as executors*, but they described themselves in their deeds to Cole and Hoskins *as executors*, and the circumstance coupled with the additional fact found in objection referred to, to-wit.: *that it was not shown that they were executors*, may justify the conclusion that the patent was issued to them as executors. For the purpose of this opinion we will therefore assume that the lands in controversy were patented to Halleck, Peachy, and Van Winkle *as executors* of the estate of Joseph L. Folsom, deceased. But would that in any manner affect plaintiff's title? In the case of *Bonds vs. Hickman*, 29 Cal. 465, the Court

We cannot hold it (the patent) to be void because it was issued to the administrator of the deceased assignee of the grant, for it is not forbidden by law to be so issued in such cases. It is not shown, upon the face of the patent, that it was issued for land to which the deceased had the right of pre-emption; and if such was in truth the case, though recited in the patent, it is not liable to be attacked collaterally on "that ground." And in the same case, when brought up on another appeal, the Court held that a patent issued by the United States to "James Smith, administrator of Robert Smith, deceased," vests the legal title in James Smith, and his conveyance of the same transferred the legal title to his grantee, though it did not state that it was made as administrator. (32 Cal. 203.) The legal title being in Halleck, Peachy and Van Winkle, they had a right to convey the land; and it is immaterial whether they in their deeds described themselves as executors or conveyed in their individual capacity.

The deeds vested in their grantees an undivided interest two-thirds—a sufficient interest to entitle them to recover the entire property from a mere trespasser or intruder.

In the case of *Treat vs. Reilly*, 35 Cal. 133, the Court says: "It has been so often held that one tenant in common can recover the entire premises as against a mere trespasser, without joining his co-tenants as plaintiffs, we are surprised that counsel should make the last point presented in their brief."

The only defense interposed by the appellant to plaintiff's right of recovery was a pretended tax title, and that branch of the case we will now consider.

It appears from the record that a judgment for the taxes assessed upon the property in controversy for the year 1868 was recovered in the District Court of Sacramento County,

and, in pursuance of the execution issued the property was sold, and a deed thereof the Sheriff of Sacramento County, on the 1st of March, 1870, to one Henry Starr. It is claimed on the part of the respondent, that Starr purchased the property at the tax sale—not on his own account, but for Charles Zeinwalt, and this fact satisfactorily appears from the transcript. It is further claimed that Zeinwalt claimed title to, a portion of the property, and it was his duty to pay the taxes. It is well settled that one who is under a moral or legal obligation to pay taxes is not in a position to become a purchaser of the property for such taxes. If such person permits the property to be sold for taxes and buys it in, either in person or through the agency of another, he does not acquire any right or title to the property, but his only remedy is one mode of paying the taxes. This question was decided by the Court in the case of *Moss vs. Shearman*. The Court say: "If the defendant was under a moral obligation to pay the taxes, he could not avoid paying the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen the title of the purchaser at the sale himself, or by suffering it to be purchased from a stranger who purchased at the sale, would be allowed to gain an advantage from the neglect or negligence in failing to pay the taxes. The law will not permit, either directly or indirectly." (*vs. Abbott*, 13 Cal. 609.)

In the more recent case of *Reilly vs. Crockett*, 357, Crockett, J., delivering the opinion of the Court, serves: "We have repeatedly said that the claim of ownership, is a subject of taxation, and the occupant the duty of paying the tax thereon." (*Reilly vs. Crockett*, 357.)

It appears, from his own evidence, that Henry Starr purchased the property at the tax sale, and the title of the property under claim of title for the year for which the tax was levied. He purchased blocks 72 and 73 and 97 in Folsom. I went out of the property for a number of years, having paid only to half of it. * * * I went out of possession in October, 1868." It is very clear, therefore, that it was the duty of Zeinwalt himself, that it was his duty to pay the taxes upon the property, and he therefore acquired title of his purchase at the tax sale.

We have not considered the proceedings

fact, or the fact of prior possession by plaintiff and his
 tors—his paper title, which is herein above set forth,
 ing perfect and amply sufficient to sustain the judgment.
 ere is no material error apparent in the transcript, and
 judgment of the Court below should therefore be affirmed.
 Judgment and order affirmed.

We concur: Sharpstein, J., Myrick, J.

concur in the judgment. The plaintiff had a right to re-
 ver on the prior possession of one Cole, from whom he
 l received a deed conveying the land, or to whose posses-
 n he succeeded: Thornton, J.

DEPARTMENT No. 1.

[Filed April 25, 1881.]

No. 7422.

LATAILLADE, RESPONDENT,

vs.

THE SANTA BARBARA GAS COMPANY, APPELLANT.

ADING IN JUSTICES' COURT—ESTOPPEL—LANDLORD AND TENANT—PRACTICE.
 Pleadings in Justices' Courts are to be liberally cons rued. Defend-
 ant is estopped from denying title if he has entered into the posses-
 sion of the premises with the permission of the plaintiff. The
 Supreme Court will not reverse a judgment on the ground that five
 dollars too much is granted a plaintiff, unless completely convinced
 of the fact.

Appeal from Superior Court, Santa Barbara County.

Marceline Gray, for respondent.

Muse & Storke, for appellant.

By the COURT:

The complaint filed in the Court of the Justice of the
 ce was sufficient to uphold a judgment by the Justice,
 sufficient in the absence of special demurrer to sustain
 judgment of the Superior Court. (4 Cal. 121; 6 *Id.* 63;
Id. 598; 16 *Id.* 372; 23 *Id.* 375.) As defendant entered
 permission of plaintiff, he is estopped from denying her
 e. (*Tewksbury vs. Magraff*, 33 Cal. 237; *Bigelow on Es-*
pell, 350 and 381.) The judgment is for thirty-six dollars.
 appellant argues with some elaboration (but we are not
 completely convinced) that this is about five dollars too
 ch.

Judgment affirmed.

In the District Court of the United States

FOR THE DISTRICT OF CALIFORNIA

Opinion on Motion to Vacate Order Appointing

HERMAN SHAINWALD, AS ASSIGNEE, ETC.,
 vs.
 HARRIS LEWIS.

RELATIONSHIP OF RECEIVER TO JUDGMENT CREDITOR NO G
 TION IN SUIT BY CREDITOR'S BILL IN EQUITY. The
 a suit should not be an indifferent person; his duty is
 adversary of the fraudulent debtor. The receiver should
 ent case, employ the counsel of the judgment creditor.
 rule is in general opposed to such employment.

By the decree of this Court the respondent was
 be indebted to the complainant as assignee of the
 a large sum of money, being the value of assets of
 firm, of which he had obtained possession, and
 converted to his own use by means of a fraudulent
 of the most flagrant character.

Execution on this decree having been returned under
 present bill, in the nature of a creditor's bill, was

It alleged, in substance, that the complainant had
 was about to make fraudulent transfers of his property
 the payment of the decree; that he had secreted
 the same; that he was about to confess judgment
 and fictitious debts; that he was about to leave the
 States, and to carry with him the proceeds of his
 that he had openly declared that he had made such
 of his property as would prevent the complainant from
 anything from his decree.

On this bill a receiver was appointed, and the
 compelled to make a general assignment of his property.
 receiver has since been actively engaged, under the
 direction of the complainant's solicitor, in endeavoring
 cover and obtain possession of property of the
 justly applicable to the payment of the decree.

The receiver is the brother of the complainant and
 represents creditors of the bankrupts who have been
 by the respondent and his co-conspirators.

A demurrer to the bill having been interposed, the
 the solicitor of the respondent in open Court declared
 to or answer the bill, and it was thereupon decreed
pro confesso.

All the allegations contained in it in respect to
 lent transfers and concealment of his property of the
 spondent, must be deemed to be true and undeniable.

is now suggested by the counsel for respondent that, in giving its final decree, this Court should order a reference to a master to report the name of a person to be appointed as receiver, and that the person so appointed should be directed to employ as counsel or solicitor the solicitor for the complainant.

The integrity and capacity of the receiver already appointed is not called in question, nor is the sufficiency of the bonds given by him.

It is merely suggested that his relationship to the complainant renders him not indifferent between the parties, and that it is proper that he should be directed by the advice of the solicitor of one of them.

A receiver is in general defined to be "An indifferent person between the parties appointed by the Court to receive and preserve the property or fund in litigation *pendente lite*, when it does seem reasonable to the Court that either party should hold it." (High on Rec. § 1.)

Such are receivers in suits for dissolution of a partnership and in other cases.

But the receiver in the present suit occupies an essentially different position, and has different functions to discharge. There is here no *lis pendens* as to a fund, the ownership of which is undetermined.

The Court has finally decreed against the respondent for the payment of a large sum of money, which decree he has failed to satisfy in whole or in part; it has, therefore, commanded him to make a general assignment to a receiver, whom it has appointed, to the end that he may discover and obtain possession of the property of the respondent, which the latter has fraudulently transferred, secreted and disposed of with the object and intent of evading the payment of the debt. If successful in baffling the admitted fraudulent designs of the respondent, he can only be so by the exercise of the utmost energy and industry, and probably by considerable litigation.

He is not, and ought not to be, indifferent between the parties. His duty requires him to be the active adversary of this fraudulent debtor and his accomplices.

In the selection of a person to discharge these duties, the respondent, in the position he now occupies, should have no preference, any more than the criminal should have in the choice of a motive to ferret out and recover the fruits of his crime.

A person, therefore, who by relationship or other connection, might be supposed to feel in some degree the desire felt by the complainant to collect the sum decreed to be due would seem, if otherwise unobjectionable, to be eminently fit to be appointed as receiver in a case like the present. For it is not to be forgotten that the complainant is himself a trustee, suing for the benefit of the defrauded creditors of the bankrupts.

The same considerations apply with equal force of counsel by the receiver. In general, he ought to be the solicitor of either party. (High on Rec., § 1 on Rec., p. 111; 8 Cal. 319).

But, in this case the person who is of all others best qualified to advise the receiver, and if necessary to stimulate him, is the solicitor, who, with indefatigable industry and perseverance, succeeded in exposing the fraudulent conspiracy, the foundation of all these proceedings, and has, through protracted litigation, the decree against the receiver, and other counsel could feel the same desire as he, should not a *brutum fulmen*, nor the same interest in the confessed fraudulent machinations of the receiver, to escape its payment.

To import new counsel into the case at this stage of the proceedings occasion delay and large additional expense, which the receiver is not in funds to meet; and such counsel, being ignorant of its previous history and its very intricate details, would be unable to afford the advice and information which the solicitor for the complainant can so readily give, and which are indispensably necessary to the receiver's efficient discharge of his duties.

For these reasons, I am of opinion that the receiver appointed should not be removed, and that he should be directed not to employ the solicitor for the complainant. (*Wetter vs. Schlieper*, Abb. Pr. R. 92; *Bank of Monmouth vs. Clarke*, 376; 28 How. Pr. 481.)

OGDEN HOFFMAN

Deputy

[Filed May 14, 1881.]

SOUTHARD HOFFMAN

By A. D. Grimwood, Deputy

Amended Final Decree.

In Equity.—No. 231.

HERMAN SHAINWALD, AS ASSIGNEE IN BANKRUPTCY OF THE FIRM OF SCHOENFELD, COHEN & CO., AND OF LOUIS ISAAC NEWMAN AND SIMON COHEN, BANKRUPTS, PLAINTIFFS,
vs.

HARRIS LEWIS, RESPONDENT.

This cause having come on to be heard at this term of Court, and the consent of all parties given in open Court by their respective counsel and solicitors, and it appearing to the Court that the same may be disposed of without further delay, the Court doth hereby decree that the same be dismissed with costs.

urrer filed on behalf of Harris Lewis, the respondent, had heretofore been duly overruled by this Court, and the said Harris Lewis, respondent, by Delos Lake, Esq., his counsel, in a Court having duly declined to make or file any plea or answer to the plaintiff's bill of complaint, and having waived in a Court by his said counsel, Delos Lake, Esq., any and every right to any time within which to file any plea or answer, and being by his said counsel, Delos Lake, Esq., requested that the trial of this cause be now forthwith proceeded with, and the plaintiff's counsel having consented to said immediate hearing: and, after hearing of arguments of counsel for the respective parties, and after due consideration, on motion of counsel for the plaintiff, it is ordered that the bill of complaint filed by the plaintiff in this cause, be and the same is hereby taken as conceded by said Harris Lewis, respondent herein.

And it is further ordered, adjudged and decreed that the injunction heretofore issued in this suit on the sixteenth day of September, A. D. 1880, out of this Court, be and the same is hereby made and declared to be perpetual.

And it is further ordered, adjudged and decreed that the complainant is entitled to the proceeds of all the choses-in-action, real property, estate and effects of the respondent, either in law or equity, in possession, reversion, or remainder, or held in trust, which belonged to him at the time of the commencement of this suit, or to so much thereof as may be necessary to satisfy the amount on the decree against the said respondent in the suit No. 221 in equity, in the bill of complaint in this cause set forth and mentioned, with lawful interest thereon and costs in this suit to be taxed.

And it is further ordered and decreed that the order heretofore made in this cause, appointing Ralph L. Shainwald receiver in, be and the same is hereby continued, ratified and confirmed; and the said receiver is hereby continued and confirmed in said office according to the terms and requirements and conditions, and with the powers, rights and duties in said order of appointment set forth and mentioned, and which pertain to the office of receiver, according to the rules and practice of the Court and of Courts of equity of the United States. And he is hereby given and vested with authority to take possession of, and recover any and all property, real and personal, which he has been and is appointed receiver by this Court in this suit, and to take such proceedings at law or in equity, and bring such suits at law or in equity as may be necessary to recover, secure or obtain possession of any and all money or property fraudulently secreted or withheld from execution by the said respondent, or transferred by him, with intent to defraud the complainant of the fruits of the decree obtained by him, and for any or all of the said purposes to retain and employ such counsel, solicitors, attorneys or agents as may be

necessary or proper, subject, nevertheless, at all times to the orders and directions of the Court, and hereby given liberty to apply for such orders and directions.

And it is further ordered, adjudged and decreed that the order heretofore made appointing Southard Hoffman referee in this cause be, and the same is hereby, continued in full force, and he is hereby vested with the usual powers, duties and authorities of a referee and master in chancery, for the time being, that he has heretofore acted as, and now is, such as may be required, and he is authorized to take and receive testimony herein, and is familiar with the facts and circumstances of the case, and the facts in this suit.

And it is further ordered, adjudged and decreed that the receiver pay to the plaintiff, out of the proceeds of the sale of the real estate of the respondent, Harris Lewis, assigned under this suit heretofore made, or under this decree, the sum of money due or payable to said plaintiff, and ordered and decreed to be paid to him by, in, and under the authority of this Court, made, entered, and enrolled in the suit No. 221, and entitled "*Herman Shainwald, as assignee of the firm of Schoenfeld, Cohen & Co., and of Isaac Newman, and Simon Cohen, bankrupts, vs. Harris Lewis, respondent,*" and also pay to the plaintiff all interest and costs that have, or may hereafter, be incurred, payable under said decree in said suit No. 221, and also the plaintiff's costs in this suit to be taxed, and the receiver bring the residue of the proceeds of the sale of the real estate, if any residue there be, into Court to abide the order of the Court thereon, and that said receiver take from the plaintiff the payment made on account of said decree in said suit No. 221, in equity, as such payments may be made by him, and at any time, a written acknowledgment of a satisfaction of the amount of such partial payment, and file the same in the office of the Clerk of this Court in said suit No. 221.

And it is further ordered, adjudged, and decreed that an order of injunction issue forthwith out of this Court for the purpose of restraining said Harris Lewis, his agents, attorneys, solicitors, and servants, and all and every other persons whatsoever, from selling, assigning, transferring, or in any way or manner whatever disposing of or interfering with any property, real or personal, things in action, debts, interests, effects, or property of any kind whatever now owned by Harris Lewis now has, or on, or subsequent to, the 1st day of November, A. D. 1880, had any interest whatsoever in, or belonged to, or was held or controlled by, said Harris Lewis, or was held for or in trust for said Harris Lewis, or for the benefit, and also from receiving, collecting, disbursing, or encumbering in any way or manner whatever, any of the debts, interests or effects; and ordering and commanding said Harris Lewis, and each and all of them, to forever refrain and

all, and every of the acts, doings, and things in and by writ of injunction enjoined and restrained; and also personally enjoining, restraining, and prohibiting said Harris Lewis, and the persons before mentioned, from making any assignment of his property, or of any part or portion of it, and confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff, and from doing any act to enable other creditors or persons, or any creditor or person to obtain any of his property, or any part or portion of his property, and also perpetually enjoining, restraining, prohibiting the said Harris Lewis, and the persons before mentioned, and each and every one of them, absolutely and entirely, from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any manner disposing of or intermeddling with any debts or demands due to the said Lewis, or any bills, bonds, notes, checks, book accounts, mortgages, judgments, or other demands due to him, the said Lewis, or any money belonging to the said Harris Lewis, or any stock or interest in any prior incorporated company, or in any firm or partnership, whether in the possession of said Harris Lewis, or held by some person in trust for him or for his use or benefit.

and it is further ordered, adjudged and decreed that the writ of *exeat Republica* of the United States of America issue out and under the seal of this Court, to restrain the said Harris Lewis from departing out of the jurisdiction of this Court.

and it is further ordered and decreed that the said Harris Lewis appear from time to time before the referee heretofore hereby appointed in this cause, and produce such books and papers, and submit to such examination, as the said referee may direct in relation to his property, equitable interests, choses in action and effects, and in relation to any and all property involved in this suit directed to be assigned to the receiver herein; and also in relation to any and all transfers, sales, assignments and conveyances of any of said property or estate made or executed by the said Harris Lewis; and also to any matter which he might have been legally required to disclose if he had answered the bill in this cause; and also in relation to any matter which he may be lawfully required to disclose; and that the said Harris Lewis execute and deliver, within ten days from the service of a copy of this decree upon him, the conveyance of his real estate, which conveyance was heretofore directed to him for execution, and which is now in the custody of the Master herein, the form of which has heretofore been approved by this Court; and that the said Harris Lewis make and execute such further assignments and conveyances of his property, real and personal, to the receiver herein as the Court shall from time to time direct.

and it is further ordered, adjudged and decreed that the

plaintiff recover his costs in this suit, and that the same be taxed by the Clerk of this Court according to the rules and practice of this Court, and that the said receiver pay the amount of said costs when taxed to said plaintiff, out of the proceeds of the said property of the respondent, Harris Lewis.

May 20, 1881.

OGDEN HOFFMAN,
Dist. Judge.

[Filed May 20th, A. D. 1881.

SOUTHARD HOFFMAN, Clerk.
By A. D. Grimwood, Deputy Clerk.]

[Entered in Book 2 of Judgments and Decrees, at page 362.]

Injunction Under Amended Decree.

No. 231.—In Equity.

HERMAN SHAINWALD, AS ASSIGNEE IN BANKRUPTCY OF THE
FIRM OF SCHOENFELD, COHEN & CO., AND OF LOUIS S. SCHOEN-
FELD, ISAAC NEWMAN, AND SIMON COHEN, INDIVIDUALLY, BANK-
RUPTS, COMPLAINANT,

vs.

HARRIS LEWIS, RESPONDENT.

The President of the United States of America,

*To Harris Lewis, and to his agents, attorneys, trustees, solicitors,
and servants, and to every, each, and all person and persons
whatsoever, acting by, through, or on behalf of said respondent,
or either or any of them, and all and every other person and
persons whatsoever,*

GREETING:

Whereas, an amended final decree has heretofore, to wit, on the 20th day of May, 1881, been duly made, filed, and entered in this Court, ordering, adjudging, and decreeing, among other things, that a writ of injunction issue forthwith out of this Court, forever enjoining and restraining the said Harris Lewis, his agents, attorneys, trustees, solicitors, and servants, and all and every other person and persons whatsoever, from selling, assigning, transferring, or in any way or manner whatever disposing of, or interfering with, any property, real or personal, things in action, equitable interests, effects, or property of any kind whatever in which said Harris Lewis now has, or on or subsequent to the 16th day of November, 1880, had any interest whatever, or

which belonged to or was held or controlled by said Harris Lewis, or was held for or in trust for said Harris Lewis, or for his use or benefit; and also from receiving, collecting, discharging, or incumbering in any way or manner whatever, any of said property, interests, or effects; and also perpetually enjoining, restraining, and prohibiting said Harris Lewis and the persons before mentioned from making any assignment of his property, or of any part or portion of it, and from confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff, and from doing any other act to enable other creditors or persons, or any creditor or person, to obtain any of his property, or any part or portion of any of his property; and also perpetually enjoining, restraining, and prohibiting the said Harris Lewis, and the persons before mentioned, and each and every one of them, absolutely and strictly, from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any manner disposing of or intermeddling with, any debts or demands due to the said Lewis, or any bills, bonds, notes, drafts, checks, book accounts, mortgages, judgments, or other debts due to him, the said Lewis, or any money belonging to him, the said Harris Lewis, or any stock, or interest in any private or incorporated company, or in any firm or partnership, whether in the possession of said Harris Lewis or held by some other person in trust for him, or for his use or benefit.

Therefore, in consideration of the premises, and of the particular matters in said decree set forth, we do strictly command you, the said Harris Lewis, your agents, attorneys, trustees, solicitors and servants, and each and every of you, and all and every other person and persons whatsoever, to cease, desist and refrain forever from selling, assigning, transferring, or in any way or manner whatever disposing of or interfering with any property, real or personal, things in action, equitable interests, effects or property of any kind whatever in which said Harris Lewis now has, or on or subsequent to the 16th day of November, 1880, had any interest whatever, or which belonged to or was held or controlled by said Harris Lewis, or was held for or in trust for said Harris Lewis, or for his use or benefit; and also from receiving, collecting, discharging, or incumbering in any way or manner whatever, any of said property, interests or effects; and also from making any assignment of his property, or of any part or portion of it, and from confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff, and doing any other act to enable other creditors or persons, or any creditor or person, to obtain any of his property, or any part or portion of any of his property; and absolutely and strictly from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any manner disposing of or intermed-

dling with any debts or demands due to the said bills, bonds, notes, drafts, checks, book accounts, judgments or other debts due to him, the said Harris any money belonging to him, the said Harris stock or interest in any private or incorporated company or any firm or partnership, whether in the possession of Harris Lewis or held by some other person in trust for his use or benefit.

Witness the Honorable Ogden Hoffman, Judge of the District Court, and the seal thereof, at San Francisco, District, on the 21st day of May, 1881.

[SEAL.]

SOUTHARD HOFFMAN
By A. D. Grimwood, De

Abstract of Recent Decisions

U. S. CIRCUIT COURT—DISTRICT OF CALIFORNIA

APPURTENANCE. A water right, granted in gross, comes technically appurtenant to land, and a mill which it is subsequently used by the grantee thereon, such water power is taken and applied to run a mill to the owner of the power, and afterwards, while the mill is so being used, the owner conveys the premises within the bounds without mentioning the water right, the mill therewith as parcel thereof, if such appears to have been the intention of the parties.—*Bank of British North America et al.*, April 6, 1881.

WATER POWER NOT APPURTENANT WHEN PASSES WITH LAND. In 1864 a water right was granted by the owner of the mill in San Francisco City, in gross; and in 1866 the same was taken to the use of a paper mill and machine shop on block 10, town; and in 1867, the same being the property of the mill, they converted it into a flour mill, and applied such water power to the use thereof continuously, until 1878, when the owner of the mill conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to secure a loan of \$20,000, payable in two years, with interest at the rate of one per centum per month—the said loan including said water right, being then worth not more than \$10,000, of which sum the water right was worth one-half. That upon the facts and circumstances of the case, it appeared that it was the intention of the parties that the water right should pass with the land and mill, and being in connection therewith, it did so pass as parcel thereof.

Pacific Coast Law Journal.

VII. JUNE 25, 1881. No. 18.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed June 4, 1881.]

No. 7417.

EFFREYS, RESPONDENT, vs. HANCOCK, APPELLANT.

JUDICE—COUNTER-CLAIM—VERDICT—EVIDENCE. To an action upon a contract for services rendered, defendant set up, by way of cross-complaint, that plaintiff had procured an excessive attachment levy on defendant's property. *Held*, that such matter constituted no defense or counter-claim, or matter of cross-complaint to plaintiff's action. A case will not be reversed on insufficiency of evidence if there is sufficient evidence to support the verdict.

Appeal from the Seventeenth District Court, Los Angeles County.

Hancock, for appellant.

McKinnel & White, for respondent.

By the Court:

This action was brought to recover the sum of \$710, claimed by the plaintiff to be due him from defendant for services rendered and for board paid by him under a contract with defendant. The case was tried by a jury and a verdict was rendered for the sum of \$683.

Two points were made on the appeal: First, that the verdict is not sustained by the evidence; and, second, that the court erred in striking out, and excluding evidence under defendant's cross-complaint.

In answer to the first point it is only necessary to say, that there was sufficient evidence in support of plaintiff's claim to justify the verdict, and so far as the cross-complaint is concerned, we need only remark that the matters therein contained constituted no defense or counter-claim (C. C. P., Sec. 438), or matter of cross-complaint (C. C. P., Sec. 442), to plaintiff's action.

Judgment and order affirmed.

IN BANK.

[Filed June 6, 1881.]

No. 7629.

SPRING VALLEY WATER WORKS, E

VS.

BOARD OF SUPERVISORS OF SAN F

CONSTITUTIONAL LAW—~~CONTRACT~~—WATER RATES TO BE FIXED BY
 SUPERVISORS—VESTED RIGHTS OF PROPERTY NOT IMPAIRED BY
 CHANGING THE MODE OF FIXING RATES—MANDAMUS—CORPORATIONS
 Section 4 of the Act of 1858, relative to the incorporation of water
 companies, and the mode of fixing the rates to be charged by them, was
 repealed by Section 1 (one), Article XIV, of the present Constitution,
 and the Act of 1881 passed in pursuance thereof; and the Board of
 Supervisors have the power to fix the rates to be charged by them.
 Section 4 of the Act of 1858 did not amount to a contract, and that
 it could not be impaired by subsequent legislation. The power of
 legislation reserved to the State the power of altering or amending
 laws in reference to corporations. Such law entered into a contract
 between the State and the petitioner, and became a contract. The
 power of alteration or amendment, however, must be preserved. The
 vested rights of corporations in such cases are as those of others.
 But the Act changing the mode of fixing the rates to be charged by
 the petitioner did not impair the vested rights of the petitioner in
 property acquired under the Act of 1858. The privilege of participating
 in the selection of agents to fix the rates for water, reserved by the
 State for regulating the rates, was subject to any laws which might
 be passed by the State in the exercise of its legislative power.
 Being a governmental power, the Legislature might change the
 agents by which a thing is to be done, and does not interfere with the
 enjoyment of the right to have the thing done. The privilege of
 participating in the selection of agents to fix the rates for water is
 a contract between the State and the petitioner: *Held*, that when the
 State, by the constitutional amendment of 1881, in pursuance thereof,
 took away from the petitioner the privilege of participating in the
 selection of public agents to fix the rates for water, it did not take
 away any of the vested rights of the petitioner; and the exception
 in that respect cannot be regarded as an unconstitutional provision.
 The prohibition of the Constitution of the United States lies only
 where there is a clear legal right to have a thing done by a public
 tribunal or officer, upon whom the law imposes the duty of doing it:
Held, accordingly, that the writ will compel the appointment of a
 Commissioner under the Act of 1881.

Application for writ of mandamus.

Fox & Kellogg and *Newlands*, for petitioner.
A. L. Rhodes and *J. L. Murphy*, for respondent.
James A. Waymire, amicus curiæ, also for respondent.

McKEE, J., delivered the opinion of the Court:

The Spring Valley Water Company was organized June 1858, under an Act of the Legislature passed April 22, 1858.

The object of its incorporation was, according to its certificate of incorporation, "to introduce into the City and County of San Francisco pure fresh water, for the purpose of furnishing it to the city and its inhabitants; and, in connection therewith, to transact all such business as might be necessary, proper and consistent with the laws and Constitution of the State of California."

In January, 1878—nearly twenty years after its incorporation—it seems to have availed itself of the provisions of Section 4 of the Act of its incorporation, to appoint two Commissioners, who, with two others appointed by the Board of Supervisors of the city and county, selected a fifth, and these constituted a Board of Commissioners, whose duty it was, under the act of incorporation, to fix the rates to be charged by the company for water supplied to consumers. After its organization, the Board fixed a tariff of rates, to take effect on January 1, 1878, and to remain in force for one year, and until new rates were established.

In July, 1878, a vacancy occurred in the Board by the death of one of its members, who had been appointed by the Board of Supervisors. The vacancy has never been filled, and now—nearly three years after the vacancy occurred—the company applies for a writ of mandate to compel the Board of Supervisors to appoint a new Commissioner.

Quod non est ius in re, mandamus lies only when there is a clear legal right to the thing, or a specific thing done by a public tribunal, or officer, in whom the law has imposed the duty of doing it. Under the charter the company had a right to have water rates fixed by a Board of Commissioners, and the duty of appointing them was imposed by the law upon the Board of Supervisors. But the law which imposed that duty was changed by Section 1 of Article XIV of the Constitution, which provides that "the rates of compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county or city or town, or the inhabitants thereof, shall be fixed annually, by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances, or legislative acts or resolutions, are passed by the governing body; and shall continue in force for one year, and no longer." And by Section 1, Article XXII, of the Constitu-

tion it was ordained "that the provisions of [the Act] are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are in harmony with such provisions of the Constitution as to the power of taxation to enforce them, shall remain in full force until 1880, unless sooner altered or repealed by the Legislature."

Section 1, Article XIV, of the Constitution of the State of California, forced by appropriate legislation. It has, therefore, the effect to nullify that provision of Section 4 of the Act under which the company organized, for the appointment of Commissioners, and the determination of water rates by the Board of Commissioners. Water rates must be fixed by the Board of Supervisors, pursuant to the provisions of the Act of 1858, and not by a Board of Commissioners appointed under the Act of 1858, unless it be that the first section of the Constitution contravenes the tenth section of Article I of the Constitution of the United States, which provides that no State shall make any law which shall impair the obligation of a contract. This is the ground taken by the Company.

The Act of 1858, under which the Company was organized, its charter, and it may be conceded that the charter was accepted by the corporation, when accepted by the incorporators, between them and the State, that the powers, franchises granted shall not be restrained, controlled or destroyed without their consent. (*Dartmouth College v. Woodward*, 4 Wheat. 709; *Pennsylvania College Cases*, 12 Pet. 39.) That must be so, unless it has been otherwise provided in the contract itself. But the Company obtained its charter under a section of the Constitution of 1849, which provided for the formation of corporations under general laws, and reserved to the State the power of altering such laws from time to time, or repealing them. As part of the Constitution of the State, this provision entered into the contract between the Company and the State, and when the Company accepted the charter of the Company, under the Act of 1858, they consented to take it subject to the powers reserved to the State. As a creature of the State, it was bound by any laws passed by its creator in exercise of powers, inherent or reserved. "But," as held by the Supreme Court of the United States, "the power of alteration and amendment is not without limitation. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the original charter of the corporation. Sheer oppression and wrong cannot be done under the guise of amendment or alteration. The power of amendment, in the sphere of the reserved powers, the vested rights of the corporation, is not unlimited."

corporations, in such cases, are surrounded by the same conditions, and are as inviolable as in other cases. (*Shields Ohio*, 95 U. S. 325.)

The question therefore remains, whether, in ordaining the Board of Supervisors shall annually fix the rate to be charged by the Company for water furnished to consumers, the State has in any way impaired the charter of the corporation, or destroyed or impaired any vested right or property acquired under it.

By the charter there was granted to the Company the right and franchise of distributing water through its pipes or mains in any part of the city, and selling it to consumers at prices to be fixed by public agents. Assuming that non-interference with the rights of the grant, or of property acquired under it, and the appointment of agents to establish the relations between the Company and the public, were obligations which were binding upon the State, and that the Company, in its part, came under an obligation to furnish water to the city of San Francisco, in case of great necessity, "free of charge," and to the inhabitants thereof at prices to be established by public agents, there was such a contract between the Company and the State as could not be violated by either of the parties to it. But it will be observed that neither the power of fixing water rates, nor of appointing the agents for that purpose, was granted to the Company. If it was in the power of the State to delegate either of those powers to a corporation or individual; it was not done by any of the laws under which the Company was incorporated. A privilege was given to the Company to participate, to a certain extent, in the selection of the agents who were to constitute the Board for determining the rates; but the privilege was subordinate to the powers reserved by the State for regulating, between the corporation and the public, the price of water furnished to the public by the appointment of agents to fix the rate to be charged for it; and the Company, under its contract with the State, had the privilege, subject at all times to any laws which might be passed by the State in the exercise of its powers of regulation and appointment. Such powers were not granted to the Company. They could not have been granted. As governmental powers, it was not in the power of the Legislature to bargain them away to corporations or individuals. Such powers," says Mr. Greenleaf, in his edition of *Principles on Real Property*, vol. 2, p. 67, "are intrusted to the Legislature to be exercised, not to be bartered away; and it is indispensable that each Legislature should assemble

with the same measure of sovereign power which its predecessors. Any act of the Legislature derived from the future exercise of powers intrusted to the public good must be void, being in effect a desert its paramount duty of the whole people.

In exercising the powers of regulating the use of a corporation which has been devoted to public use, the appointment of agents for the performance of duties between the corporation and the public, the State has the right to require the corporation to participate in the selection of agents, or it may select any of the corporators of the corporation to act in connection with other agents. But in so doing it acts *ex mera gratia*. By making such appointments the State does not incur any obligation to continue them in any mode of appointing agents. It may change the mode which appointments shall be made. It may discontinue at any time those who have been appointed, and appoint in any mode it sees fit. The power of the State over its officers is unlimited, except by constitutional provisions. In the absence of any constitutional prohibitive provision, fixing the term of office of any officer, or his compensation, the Legislature may change the mode of compensation even while the officer is in office. *Dickinson*, 27 Cal. 470; *In re Bulger*, 45 Id. 553.

Changing the agents by which a thing is to be done, or a corporation is entitled to have done, does not destroy the enjoyment of the right itself. The right itself is recognized and protected by law, although the performance of the duty may be appointed for the performance of the duty upon which the right rests. The change in the mode of performance does not diminish the duty, nor impair the right. If by constitutional amendment there was, therefore, no interference with the duty assumed by the State, and no interference with the rights of the Company under its charter. A privilege in participating in the selection of agents for the performance of public duty between it and the public has been recognized, but that privilege was in no sense a part of the right between it and the State. The State was not under any obligation to continue it, or to make it co-exist with the grant of the charter. As a mere privilege, it was held it subject to the retained powers of the State, the exercise of which, it was liable at any time to be modified or annulled. By the constitutional amendment the State has annulled it; but in doing so, it has not interfered with the charter of the Company, or disturbed the property acquired under it, or obstructed the Company.

oyment of any of those rights. The rights and duties of company and of the State, arising out of the charter, are intact and unimpaired. No property, tangible or intangible, of the Company has been interfered with. The water which it is engaged as a business in selling to the public is guarded and protected by law as its property; but, as property, which has been devoted to the use of the public, it is subject to the regulation and control of the State; and the State, while it has sanctioned the use, has a duty to discharge to the public by regulating the use, as well as the powers and privileges of the corporation incidental to the use. These things are not of the contract; they appertain to the sovereignty of the State, and cannot be bargained away. "All property," says Chief Justice Waite, "which is affected with a public interest ceases to be a *juris privati* only, and becomes subject to regulation for public benefit; and property is affected with a public interest whenever it is devoted to such use as to make it of public consequence and to directly affect the community at large." (*Munn vs. Illinois*, 94 U. S. 126.) It is this use of property invested in a public business, and the powers and duties of a corporation incidental to it, which in its relations to the public, are always subject to the regulation of the State. Every corporation when it accepts a charter consents to this regulation by the State; and the power of the State to regulate the use may be exercised to almost any extent to carry into effect the original purposes of the grant and to protect the rights of the public and of the incorporators, or to promote due administration of the affairs of the corporation. (*Miller vs. The State*, 15 Wallace, 311; *Yoke Water Co. vs. Lyman, Id.*, 511.) Whence it results that, when the State, by the constitutional amendment of 1879, took away from the petitioner the privilege of participating in the selection of public agents to perform the duty, under its charter, of fixing water rates between it and the public, it did not interfere with any of the vested rights of the Company, and the exercise of its power in that respect cannot be regarded as an unconstitutional act within the prohibition of the Federal Constitution. The application of the petitioner is therefore denied.

concur: Sharpstein, J.

CONCURRING OPINIONS.

concur in the judgment. I also concur in the views of Justice McKee, except as to what is said regarding the

power of the State, independent of the provisions of the State Constitution, to restrain or control franchises granted to corporations, without their consent, and as to the validity of a franchise constituting a contract; upon that point I express no opinion: Myrick, J.

I concur in the judgment, and for the most part the opinion is said in the opinion of McKee, J.; but I am of opinion that the right to change the mode of determining the rates to be charged for water furnished, remained in the State and was never alienated by the Act of 1858. The matter of fixing such rates is governed by the Act of 1858, and is not a contract formed no part of any contract with the corporation. The change therefore made by Section 14 of Article XIV of the present Constitution invalidates the contract made with the corporation, and is not in violation of any provision of the Constitution of the United States. The fixing of rates affects no right of property in the water furnished consumers. It takes no water from the corporation, and it deprives them of no right to sell water at the rates. It is not to be presumed in advance, either as a matter of law or fact, that the Board of Supervisors will fix rates as fairly and justly to all parties as any Court could select under and in accordance with the provisions of the fourth section of the Act of 1858. A just and equitable determination is all that is required or desired by any party to the litigation. The Board is not to make other than equitable determination in the matter submitted to it. We cannot perceive that it can be said that any right of property of the corporation is affected by the change made by the present Constitution of the State.

In coming to this conclusion I lay out of view the question of power to the Legislature as expressed in the Constitution of 1849. In the view I take of the matter it is unnecessary to invoke that section to sustain the conclusion reached. It may, however, fortify such conclusion. The view here expressed is in accordance with the opinion in *Stone vs. Mississippi*, 101, U. S. Rep., 814:

DISSENTING OPINION.

I dissent. In the recent case of *Stone vs. Mississippi*, reported in 101 U. S., at page 814, Mr. Chief Justice delivering the unanimous opinion of the Supreme Court of the United States, declared that "it is now too

and that any contract which a State actually enters into when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. * * * In this connection, however (proceeds the Chief Justice), it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are. * * * The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries (which was the case there under consideration) there can be no difficulty."

The language thus employed by the Court presents the principles which must govern the case before us in a clear light. The first inquiry for us, therefore, is, was there ever any contract between the Spring Valley Water Works and the State, and if so, what was its nature? To determine this question we must look to the law under which the Company was incorporated. It was organized on the 19th of June, 1858—its certificate of incorporation reciting that it was formed "under and in conformity with an act of the Legislature of the State of California, entitled 'An act to authorize George H. Ensign and other owners of the Spring Valley Water Works to lay down water pipes in the city and county of San Francisco,' passed April 23, 1858, and by virtue of an act of the Legislature aforesaid, entitled 'An act for the incorporation of water companies,' passed April 22, 1858, and in conformity with such other laws, or parts of laws, relating to the formation of corporations, as are now in force in said State of California." The certificate of incorporation further recites that "the object for which said Company is formed, is the introduction of pure, fresh water into the city and county of San Francisco, and into any part thereof, from any point or points, place or places, for the purpose of supplying the inhabitants of said city and county with the same, and to do and transact all such business relating thereto as may be necessary, and proper; not, however, to be inconsistent with the laws and Constitution of the State of California."

It is not necessary to make further mention of the Ensign

Act, for the reason that it was void, as was held in *Cisco vs. S. V. W. W.*, 48 Cal. 493.

The act of April 22, 1858, although entitled "the incorporation of water companies" in reality within itself no provisions for the incorporation of any company. Its first section provided that the provisions of the act of April 14, 1853, for the formation of corporations for certain purposes and the provisions of the act of April 30, 1855, "shall extend to all corporations formed, or hereafter to be formed, *under said acts of 1853 and 1855,*) for the purpose of supplying any city or county, or any cities or towns in this State with pure, fresh water." The sections of the act of April 22, 1858, except those relating to certain rights and privileges conferred, and the obligations imposed on any company incorporated for the purposes specified in the first section; and the last section is in these words: "Any incorporation hereafter made for the purposes specified in this act, shall be subject to the provisions of the act of April 14, 1853, to reincorporate under the provisions of this act, losing, forfeiting or diminishing any of the rights, franchises, or immunities which they have heretofore fully acquired."

While the section of the Act of April 22, 1858, as well as its title, indicates that it was supplementary to the Act of April 14, 1853, and the Legislature that provisions were therein made in relation to corporations formed under it, it will appear from the Act in question of which I have already stated, that the provisions of the Act of April 22, 1858, are in substance those to which it refers, namely, that the Act of April 14, 1853, and the amendatory Act of April 30, 1855, be a part of the law for the formation of water companies, while the Spring Valley Water Works had to look to the Act of 1853 for the machinery by which to incorporate, and subject to the burdens imposed, and entitled to the rights and privileges granted by the Act of April 22, 1858.

Through and by means of that Act the Legislature said to all of its people, that all corporations formed under its laws for the purpose of supplying any city or county, or any cities or towns in the State, or any cities or towns thereof, with pure, fresh water, should be subject to all of the rights and privileges, and be subject to all the duties and obligations therein prescribed. The Act of April 22, 1858, gave the power to acquire property necessary for the use of corporations and the right, subject to the reasonable

the Board of Supervisors or city or town authorities, as to the mode and manner of exercising such right, to use so much of the streets, ways and alleys in any town, city, or county, or on any public road therein, as should be necessary for laying pipes for conducting water, etc.

The fourth section, which is the one most material to be considered in this case, provided: "All corporations formed under the provisions of this Act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city and town, for family uses so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water to the extent of their means, to such city and county, or city or town, in case of other great necessity, free of charge. And the rates to be charged for water shall be determined by a Board of Commissioners, to be selected as follows: Two by such city and county or city or town authorities, and two by the Water Company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said Board; if the four Commissioners cannot agree upon a fifth then the Sheriff of the county shall appoint such fifth person. The decision of a majority of said Board shall determine the rates to be charged for water for one year, and until new rates shall be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water not inconsistent with this act and the laws and Constitution of this State."

By incorporating and availing itself of the privileges of this Act, the Spring Valley Water Company became bound, among other things, to furnish water to the extent of its means, to the City and County of San Francisco, in case of other great necessity, free of charge, and it has already been determined by this Court that the words "other great necessity" include all water necessary for sprinkling streets, watering public squares and parks, for flushing sewers, and for all like purposes beneficial to the public. But why was the company bound to furnish its water for such purposes free of charge? Simply because by accepting the offer held out by the Act of 1858, and incorporating and availing itself of its privileges, it agreed—*contracted*—to do so, and was bound by the terms of the contract. By the exercise of no governmental power of which I am aware could the Spring Valley Water Works be compelled to furnish the City and County of San Francisco with water, free of charge, for any

purpose. That obligation could, and did, only arise out of the contract. But the contract did not end there; for by it the Company also bound itself, and became entitled, to furnish pure, fresh water to such of the inhabitants of the city and county as should wish to take it, so long as the supply should permit, for family uses, at reasonable rates and without distinction of persons, upon proper demand therefor—the rates to be charged for water so furnished to be fixed, however, in the manner specified in the Act. This right was a part and the principal part, of the consideration the Company received for its agreement to furnish the city and county with water for the purposes mentioned, free of charge.

The manner of fixing the rates was as much a part of the agreement between the Company and the State as was the agreement to furnish the public water for certain purposes free of charge. Both, as I understand it, rested upon contract, and upon contract alone—the one as much as the other, and both relating to property rights—to the terms upon which the company should sell and dispose of the water it owned.

But it is said that the manner of fixing the rates to be charged by the Company for water furnished the inhabitants of the city and county, prescribed by the Act of 1858, has been changed by Section 1 of Article XIV, of the new Constitution, which is in these words:

“The use of all water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the control of the State, in the manner prescribed by law; *provided*, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the Board of Supervisors, or City and County, or City or Town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and shall take effect on the first day of July thereafter. Any Board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such other processes and penalties as the Legislature may prescribe. Any person,

any person, company or corporation collecting water rates in any city and county, or city or town in this State, or otherwise than as so established, shall forfeit the franchise and water works of such person, company or corporation to the city and county, or city or town, where the same are collected for public use.

If, as is said in the prevailing opinion, the provisions of section of the new Constitution have struck null the provisions of the act of 1858 relating to the fixing of the rates to be charged for water furnished the inhabitants of the city and county, I am unable to see why it has not also struck down those provisions of that act requiring the Company to furnish the city and county with water, for the purposes therein mentioned, *free of charge*. The one is as much a part of the contract between the State and the Company as the other. If there was a contract between the State and the Company at all (and I understood the prevailing opinion to proceed upon the theory that there was) I know of no ground for saying that the clause relating to the fixing of rates to be charged for the water furnished by the Company to the inhabitants of the city and county was not a part of that contract. In my opinion it was a most material part of it, proceeding as it did for fixing the amount of money the Company would receive for its water.

If the above cited provision of the new Constitution affects the contract at all, I see no escape from the conclusion that the Spring Valley Company is thereby relieved from the necessity of furnishing the city and county with any water, for any purpose, free of charge; because if the contract relating to the furnishing of water by the company is vitiated in part, it is vitiated altogether, and because the Constitution declares "that the rates or compensation to be collected from any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or to the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors, or city and county, or city and town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer." There is in this provision no exception of any character, but its language is general and sweeping. In my opinion, however, this provision of the Constitution does not in any way affect the contract by which the Spring Valley Water Works bound itself to furnish the City and County of San Francisco with water for certain purposes, free of charge,

and by which it became entitled to have the rates to be charged for water furnished the inhabitants of the city and county fixed as prescribed in the Act of 1858, for the reason that it is one of those relating to property rights—to the amount the company should be paid for the property it owned—and therefore comes within the protection of that clause of the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. The ground upon which it is sought to make the provisions of the present Constitution apply to, and consequently control, the provisions of the Act of 1858 in the particular mentioned is, that at the time that Act was adopted, and at the time the Spring Valley Water Works incorporated, there was a provision in the then existing Constitution providing that: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed," and that by reason of the power thus reserved to the State, it was competent for the law-making power to alter, amend or repeal the provision in question here.

No one, I presume, will dispute the general proposition that the charter of a corporation is subject to the reserved power in the State to alter or amend or repeal at any time any of its provisions, subject to the limitation, however, that such alteration or amendment must be reasonable, and consistent with the scope and object of the Act of incorporation. (*Shields vs. Ohio*, 95 U. S., 325. *Sinking Fund Cases*, 99 U. S., 720.) Nor the proposition that one Legislature cannot irrevocably bargain away any of its governmental powers, such, for example, as the right of eminent domain provided for in the second section of the Act of 1858. On the other hand, it is just as clear that the Legislature may contract with a private corporation concerning the property of such corporation, and that such a contract may be contained in the charter of the corporation, and when made becomes a vested right and beyond the reach of subsequent legislation. (*Stone vs. Mississippi*, 101 U. S., 817, 820; *Cooley's Const. Lim.*, 4th ed., p. 347; *Commonwealth vs. Essex Co.*, 13 Gray, 253; *Sage vs. Dillard*, 15 B. Munroe, Ky., 349.) Of this latter character, in my opinion, was the contract before us in the present case. Therefore, in my view, it becomes unnecessary to inquire whether a charge in the provision of the Act of 1850, securing to the Water Company reasonable rates for water furnished the inhabitants of the city and county, to be fixed by a commission, in the appointment of which the

pany should have a voice, to such rates as the "Board of Supervisors * * * * or other governing body of the city and county" should fix (without limitation or qualification), and coupled with the condition that if the Company should collect any water rates otherwise than as so established, it should forfeit its franchise and water works—reservoirs and pipes and water—to the city and county, for the use of the public, would be a reasonable amendment of the law, and so permissible under the reserved power of the State. It seems to me it would be stretching the reserved power almost, if not quite, beyond limit, if this can be done. However, it is not necessary, in my view of the case, to express any opinion upon that question. For the reasons already stated I am constrained to dissent from the judgment of my associates.

I think the petitioner entitled to the writ prayed for, and that it ought to be granted: Ross, J.

DEPARTMENT No. 2.

[Filed May 31, 1881.]

No. 7403.

HOECKEL, APPELLANT, vs. REESE, RESPONDENT.

TRACT—TITLE—CONVEYANCE—MORTGAGE—CONSIDERATION—TENDER—ACTION. Tender of a deed to premises in pursuance of a contract to convey a perfect title is insufficient if there is a mortgage existing on the premises of date prior to the tender unsatisfied and undischarged. In such a case an action cannot be maintained for the consideration.

Appeal from Superior Court of Sacramento County.

Dunlap & Van Fleet and *A. C. Hinkson*, for appellant.
Freeman & Bates, for respondent.

By the COURT:

This is the counterpart of *Reese vs. Hoeckel*, No. 7210. We do not think that the deed tendered by the appellant to the respondent would convey a perfect title to the premises, so long as there was a mortgage on them of prior date unsatisfied and undischarged. The obligation of the respondent was dependent upon a conveyance to him of a perfect title in the land by appellant's assignor. No such conveyance having been tendered, it necessarily follows that no action for the consideration can be maintained. Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed May 31, 1881.]

No. 10,598.

THE PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT,
VS.
WILLIAM BECK, APPELLANT.

CRIMINAL LAW—INSTRUCTION—REASONABLE DOUBT—DEFENDANT AS A WITNESS—REPUTATION. *People vs. Gilbert* (January 4, 1881), as to irregularity of recording verdict not affecting a substantial right of defendant, affirmed. An instruction: "Before conviction, the persuasion of guilt produced by the evidence ought to amount to *almost a certainty*, or such a moral certainty as convinces the minds of the jury as reasonable men," while unsatisfactory is not erroneous. A defendant offering himself as a witness is subject to the rules governing other witnesses, and his reputation for truth, honesty and integrity may be impeached,

Appeal from Superior Court, Shasta County.

Attorney-General Hart, for respondent.

Garter & Sweeney, for appellant.

MORRISON, C. J., delivered the opinion of the Court.

The appellant, William Beck, was indicted by the Grand Jury of Shasta County for the crime of grand larceny. On this indictment he was tried and convicted and adjudged to suffer two years and six months' imprisonment in the State Prison, and from that judgment he prosecutes this appeal. The first ground upon which the appellant relies for a reversal of the judgment, grows out of an alleged irregularity in entering or recording the verdict of the jury; but as the question here presented was duly considered and passed upon adversely to the applicant, in the case of the *People vs. Gilbert* (opinion filed January 4, 1881), a further examination of it is deemed unnecessary in this case.

2. The second objection is to an instruction of the Court upon the amount of evidence required to justify a verdict of guilty in a criminal case. The Court told the jury that "before conviction the persuasion of guilt produced by the evidence ought to amount to *almost a certainty*, or such a moral certainty as convinces the minds of the jury as reasonable men." It is very clear that the law does not require the guilt of a party prosecuted for a crime to be established by evidence which amounts to mathematical certainty—evidence which excludes all possible doubt; but the rule is, that the

ence shall be such as to exclude all *reasonable doubt*. portion of the charge above referred to may be considered unsatisfactory, but it is not erroneous. In the charge followed, however, the law was clearly and correctly given to the jury in the language of Chief Justice Shaw in the Webster case, and that charge has been adopted as a correct definition of the term "reasonable doubt," by the Supreme Court. (*People vs. Ashe*, 44 Cal., 288. See also *People vs. Cronin*, 34 Cal., 191; *People vs. Padillia*, 42 Cal., 535.)

The remaining point in the case relates to the admission of evidence which was objected to on the trial. The defendant offered himself as a witness on his own behalf, and, after he had testified, the District Attorney called one H. F. [name] as a witness and asked him the following question: "Are you acquainted with the general reputation of the defendant for truth, honesty and integrity?" To this question the counsel for the defendant objected, on the ground that it was incompetent for the prosecution to attack the reputation of the defendant in a criminal case, until the defense has first introduced evidence to prove the good character of the defendant. The objection was overruled, and the witness testified that he was acquainted with the general reputation of the defendant in respect to the traits inquired of, and that such general reputation was bad. There is no doubt that the rule applied for by the counsel for the defense is, generally speaking, the correct one; but it has no application when the defendant becomes a witness in the case and testifies in his own behalf.

This question was before the Court in the case of *Clark vs. Reese* (35 Cal. 89), and it was there held that "when the defendant became a witness in his own behalf, he subjected himself to all the rules regulating the examination and cross-examination of witnesses. His privilege was no greater than that of any other witness; he dropped, for the time being, the character of a party and took on that of a witness." The rule in the above case was followed in the criminal case of *People vs. Reinhart*, 39 Cal. 449, and also in the very recent case of the *People vs. Johnson*, decided by this Court, and reported in the February 24, 1881). The Code of Civil Procedure, Section 2,051 provides that a witness may be impeached by evidence that his general reputation for "truth, honesty and integrity is bad," and Section 1,102 of the Penal Code declares that "the rules of evidence in civil actions are applicable also in criminal actions, except as otherwise provided in this Code"—the Penal Code. The rule is mani-

festly a just one. The defendant is not required to testify, and no unfavorable conclusion can be deduced from his silence. But the law gives him the privilege of testifying in his own behalf, and if he choose to exercise that privilege there is no good reason why his reputation, as a witness, should not be subject to attack in the same manner that the reputation of any other witness may be impeached.

No error appearing in the record the judgment and order are affirmed.

We concur: Sharpstein, J., Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed May 17, 1880.]

No. 6772.

HEY SING YECK, RESPONDENT,

VS.

ANDERSON, APPELLANT.

CONSTITUTIONAL LAW—FISH LAW—FORFEITURE—DUE PROCESS OF LAW—CLAIM AND DELIVERY—NOTICE. A forfeiture of property cannot be enforced without judicial proceedings had for the purpose of determining whether it is liable to condemnation; the owner is entitled to notice of the charge for which the forfeiture is claimed, and of the time and place for the determination thereof: *Held accordingly*, that so much of Section 636, Penal Code, as authorizes an arbitrary seizure of the property of a party, is unconstitutional. Plaintiff rented boats and fishing tackle to Chinese fishermen, who were using it at a distance of more than one-third way across a slough in Solano County. Section 636, Penal Code, declares such use to be a misdemeanor, and the boats and tackles subject to forfeiture. Defendant, as constable, seized the property as being subject to forfeiture. Plaintiff did not know of the unlawful use to which the property was to be put: *Held* that he could not be deprived of his property without judicial proceedings, and was entitled to maintain an action of "claim and delivery" for the property taken by the constable.

Appeal from Fifteenth District Court, San Francisco.

King & Rodgers, for respondent.

O. R. Coghlan, for appellant.

McKEE, J., delivered the opinion of the Court.

This was an action of claim and delivery for one net, three boats and fishing tackle alleged to have been taken and wrongfully detained from the plaintiff.

It appears that the property belonged to the plaintiff, who had rented it to certain Chinese fishermen for the purpose of fishing in the tide-waters of the State. In December,

8, these men, who had possession of the property, were fishing fish in what is known as Montezuma Cut-off Slough, within the jurisdiction of Solano County, by casting and extending their nets more than one-third the way across the slough. That contrivance for catching fish was prohibited Section 636, Chapter 1, Title XV, of the Penal Code, which declared that "every person who shall cast, extend, set any seine or net of any kind, for the catching of fish in any river, stream, or slough of this State, which shall extend more than one-third across the width of said river, stream, or slough, at the time and place of such fishing, is guilty of a misdemeanor," punishable by fine or imprisonment, or both. Further, it declared that "all nets, seines, fishing tackle, boats, or other implements used in catching fish in violation of the provisions of this chapter shall be forfeited, and may be seized by the peace officer of the county or his assistant, and may be by him destroyed or sold at public auction upon notice posted in the county for ten days."

At the time of the fishing the defendant was an acting constable of Suisun Township. In that capacity he arrested the men for a violation of the law, and seized their nets, boats, and fishing tackle. The seizure was followed by the prosecution of the offenders, and they were severally convicted and sentenced to pay a fine. No fault is found with the proceedings against them personally. But no proceedings of any kind were taken against the property which had been seized.

The Court below found as a fact that the plaintiff knew of the unlawful use of his property by those to whom he had hired it, and did not "connive at or encourage" such use; and it would seem to be harsh justice, to say the least, to deprive him of his property for no guilty act of his own. It may be conceded that the innocence of the plaintiff would not exempt his property from the punishment of a statute, the provisions of which it had been used to violate, if the statute itself had provided for enforcing the punishment by some judicial proceedings against it. Under such circumstances, property used to commit the aggression might be treated as an offender—as the guilty instrument or thing to which the forfeiture denounced by the statute attached—without reference to the character or conduct of the owner. But the statute under consideration contained no provisions whatever for determining whether the property was liable to condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their

possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county, for five days.

Such an enactment cannot be harmonized with those constitutional guarantees which are supposed to secure everyone within the State in his rights of liberty and property. "No man," says Mr. Cooley in his work on Constitutional Limitations, "can by his misconduct forfeit his property unless steps are taken to have the forfeiture declared in due judicial proceedings. Forfeitures of rights or property cannot be adjudged by legislative act; and confiscations without a judicial hearing and judgment after due notice would be void as not due process of law."

The cases of the *United States vs. Brig "Malek,"* 2 How. U. S., and *Henderson's Distilled Spirits*, 14 Wall. 44, cited in argument by counsel of defendant, arose out of judicial proceedings *in rem* to subject property to condemnation, for an alleged violation of the criminal or revenue laws of the United States, and they are authority for the principle that forfeitures are not adjudgable by legislative act, except it may be for a violation of the revenue laws; "except," says the Supreme Court of Michigan, "in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right, that no person can legally be divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial proceedings are required by the Constitution to be exercised by courts of justice. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination." The law of the land in judicial proceedings requires a hearing before condemnation, and judgment before dispossession.

It follows that so much of the statute under consideration, as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture without judicial proceedings for its condemnation, or monition or notice, actual or constructive, to its owner, of the charges for which the forfeiture was claimed, and of the time and place for determining them, was unconstitutional and void,

afforded no protection to the defendant for the detention of the property in question.

Verdict affirmed.

Concur: McKinstry, J., Ross, J.,

DEPARTMENT No. 2.

[Filed May 23, 1881.]

No. 7538.

ORA, APPELLANT, VS. LEROY ET AL., RESPONDENTS.

DECEASED—AMENDED COMPLAINT—PARTIES—SUBSTITUTION—JUDGMENT—
DEMURRER—ADVERSE CLAIM—RELIEF—ACTION TO QUIET TITLE BY
HOLDER OF ESTATE LESS THAN A FEE. Defendants, by answering an
amended complaint filed by a party who has been substituted for the
original plaintiff, make themselves parties defendant, and will not be
heard to object that there had been no regular substitution of plain-
tiff, or that they were not regularly made parties defendant. A de-
fendant is entitled to final judgment, in case a demurrer, upon the
ground that the facts stated do not constitute a cause of action, is sus-
tained. An allegation that plaintiff is the owner and seized in fee of
land which is held in trust by him for the use and benefit of a church,
coupled with an allegation that defendants claim an estate or interest
in the land adverse to him, presents a case of conflicting claims to
real property. The owner of an estate or interest in land less than
an estate in fee, may maintain an action to determine an adverse
claim. Superfluous matter in a complaint may be remedied by motion
to strike out. The capacity of a plaintiff to sue cannot be tested by
a demurrer on the ground that the complaint does not state facts suf-
ficient to constitute a cause of action, or that it is ambiguous, unin-
telligible and uncertain. If plaintiff is entitled to any relief, a de-
murrer should be overruled.

Appeal from First District Court, Ventura County.

Howard, Granger, Williams & Williams, for appellant.
Harmon, Pringle & Hayne and *B. S. Brooks*, for respond-

ents.

S. SHARPSTEIN, J., delivered the opinion of the Court:

This action was originally commenced by the plaintiff's
predecessor, Thaddeus Amat, "Roman Catholic Bishop of
Monterey," whose death was suggested pending the action,
and immediately thereafter the plaintiff filed an amended
complaint, in the title of which he is styled plaintiff, and
the defendants named in the original complaint and some
others are styled defendants. The persons named as defend-
ants in the amended complaint filed an answer thereto.
Afterwards the plaintiff filed another and "last amended
complaint," as it is styled, to which the defendant demurred

on two grounds: (1) that it does not state facts sufficient to constitute a cause of action; (2) that it is ambiguous, unintelligible and uncertain.

The record does not disclose how the plaintiff in the amended complaint was substituted for the one named in the original, or how the defendants other than those named in the original were made parties to the action, except that by answering the amended complaint they voluntarily made themselves parties to it, and cannot now be heard to object that it does not appear that the present plaintiff was regularly substituted for the original, or that the additional defendants were regularly made parties to the action.

The demurrer was sustained without leave to amend the complaint, and a judgment ordered and entered "that the complaint herein be dismissed for want of equity, and that the defendants go hereof without day, and that they recover from said plaintiff their costs of this suit, taxed at \$——"

Whenever a demurrer is sustained to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, without leave to amend, the defendant is entitled to have a final judgment entered in his favor. As was said in *Bauman vs. The New York C. R. R. Co.* (10 How. Pr. 218): "The demurrer in this case is to the whole complaint, and the decision upon it is that the plaintiff has no right of action. Nothing remains to be done by the defendants after the decision but to have their costs adjusted, and to perfect judgment in their favor against the plaintiff."

And this brings us to the question whether the demurrer was properly sustained. The object of the action, as disclosed in the prayer of the complaint, was to have a claim of the defendants, which was adverse to that of the plaintiff, to certain real estate, determined. The plaintiff alleges that he "is a sole corporation duly created and acting by and under authority of law, under the name and style of the 'Roman Catholic Bishop of Monterey,' and that he is the lawful successor * * * to Jose de Jesus de Gonzales, formerly holding the office of Governor of the Mitre and Head of the Diocese of Santa Barbara in this State, in and for the benefit of the Roman Catholic Church," and as such Bishop, or sole corporation, he is the owner, seized in fee of certain real estate held by him in trust for the use and benefit of the Roman Catholic Church of San Buenaventura, and that the defendants claim an estate or interest in said land adverse to him. This is followed by allegations to the effect, as we construe them, that a grant of lands, known as the "Ex-Mission of San Buenaventura," was made to the predecessor

Poli, and in trust for the church, and that Poli, as the cessor of the original grantee, obtained a patent for said land and held it charged with that trust, and that the beneficiary of that trust renounced and exchanged the same for Rancho Laguna, which is within said grant patented to him, as aforesaid. It is to this land that the defendants are alleged to claim an estate or interest adverse to the plaintiff, which he seeks in this action to have determined. The plaintiff alleges that he is the owner and seized in fee of this land, which is held in trust by him for the use and benefit of the Church. That, coupled with the other allegation that the defendants claim an estate or interest in said land adverse to him, presents a case of conflicting claims to real property.

That there is much in the complaint that is superfluous, we are ready to admit. But that could have been remedied by amendment to strike out.

We think that the complaint shows that the plaintiff has sufficient interest in the land to enable him to maintain the action. (*Pierce vs. Felter*, 53 Cal. 18.)

The objection that it does not appear that the plaintiff has legal capacity to sue cannot be availed of upon either of the grounds of demurrer stated in this case. Whether the allegation of the complaint in respect of the plaintiff being a corporation is sufficient or not, cannot be determined upon a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. A demurrer has no application to the capacity of the plaintiff to sue. (*The Phoenix Bank vs. Donnell*, 40 N. Y. 100.)

It being admitted that a sole corporation, such as the plaintiff claims that he is, could hold real estate not exceeding four full lots in a town or city, or twenty acres in the country in trust for a church, the question whether the plaintiff could so hold the quantity which he claims in his complaint in this action need not now be determined. If the complaint shows that the plaintiff is entitled to any relief, the demurrer was improperly sustained. His right to have title quieted to four lots or twenty acres is not affected by his claim to have it quieted to 1,000 acres or more.

Judgment reversed and cause remanded, with directions to the Superior Court of Ventura county to overrule the demurrer to the complaint, with leave to the defendants to answer within ten days after being notified of the overruling of said demurrer.

We concur: Morrison, C. J.; Myrick, J.

IN BANK.

[Filed June 14, 1881.]

No. 6699.

TREGAMBO ET AL., RESPONDENTS,
VS.COMANCHE MILL AND MINING COMPANY,
APPELLANT.

PRACTICE—JUDGMENT—DEFAULT—BILL OF EXCEPTIONS—SETTLEMENT OF TIME—FILING PAPERS—WAIVER OF FEES BY COURT CLERK—TRIAL—APPEAL—CHARGE FOR FILING DEMURRER. It is not necessary to present a bill of exceptions for settlement at the time of taking an exception to a ruling made before final judgment. Such bill may be presented and settled afterwards, as provided in Section 650, C. C. P.: *Held*, accordingly, that an exception taken to an order refusing to set aside a default settled more than twenty days after the judgment was entered, and filed after an appeal had been taken to the Supreme Court, was properly a part of the record on appeal. An exception to a decision rendered upon a motion to set aside a default is an exception "taken at the trial." The omission of duty by a Court clerk does not prejudice the legal rights of a party litigant. The failure of a Court clerk to demand his fees in advance, upon the receipt of demurrers for filing, is a waiver of prepayment of the fees, which waiver the clerk has power to make. In such case the demurrers are in contemplation of law on file, and indorsement of filing is unnecessary. Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. A judgment by default, entered after a demurrer has been filed, is premature. A clerk of a Court is not authorized to charge \$3 for filing a demurrer. An order refusing to set aside a default is not an appealable order.

Appeal from the Sixteenth District Court, Mono County.

Bennett & Hetzell and *Thornton*, for respondents.

D. W. Douthitt, for appellant.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action which was commenced in the late District Court of Mono County by the respondents, who were plaintiffs in the Court below, to obtain a judgment and foreclosure of mechanics' liens upon the property of the Comanche Mill and Mining Company, the defendant and appellant. Process was served on the company in San Francisco, March 22, 1879. May 2, 1879, default of defendant for not answering was entered. Motion to set aside this default, and allow the defendant to answer, was made upon affidavits, and denied by the Court on May 10, 1879. When the decision was rendered, the attorneys for the defendant were present, and excepted, but they presented no bill of exceptions to the Judge, as they might have done under Sec-

in 649 of the Code of Civil Procedure. In that position the parties the Court referred the case to the Court Commissioner, and, upon the coming in of his report, judgment was rendered and entered in favor of the plaintiffs against the defendant on the nineteenth of May, 1879; and, on the twentieth day of May, 1879, the defendant appealed from the judgment and the order denying the motion to set aside the default. More than twenty days after the judgment, the Judge of the Court settled a bill of exceptions taken to the order refusing to set aside the default, and more than thirty days after the appeal had been taken the settled bill of exceptions was filed.

An order refusing to set aside a default is not an appealable order. Therefore the only appeal before us is from the judgment, and that presents for consideration the judgment only, unless the bill of exceptions contained in the transcript is to be considered as part of the record of the case. The respondents attack it as too late, because it was not presented for settlement at the time the exception was taken, according to Section 649, C. C. P.

But that section only declares that a bill of exceptions to a decision *may* be presented to the Court or Judge for settlement at the time the decision is made, and, after having been settled, shall be signed by the Judge and filed with the clerk. If a statute absolutely fixes the time within which an appeal must be done, it is peremptory. The act cannot be done at any other time, unless, during the existence of the prescribed time, it has been extended, by an order made for that purpose under authority of law. Section 1054, C. C. P., authorizes such an extension to be made within the limits of ten days. But no order extending time in this case was applied for or granted; therefore the time for presentation of such as was prescribed by law, if any. There is no specific time fixed by law for presenting a bill of exceptions for settlement, unless it be found in Sections 649 and 650 of the Code of Civil Procedure. Section 649 does not fix any specific time for the performance of such an act. It only declares that the act *may* be done immediately upon the rendition of the decision to which exception is taken—and this decision is one which may be rendered at any time; but it does not require the act to be done at the risk of forfeiture of the right to have it done. If not done immediately upon the rendition of the decision, the right is not taken away. It exists, and, in our judgment, may be exercised at any time prescribed by Section 650, C. C. P.

That was the construction of Sections 649 and 650 by the

late Supreme Court, before the sections were amended by the Legislatures of 1874 and 1876. Under Section 649, as it existed before it was amended, a party excepting had the right to present his bill of exceptions at the time of the ruling of which he complained; but if not presented at the time of the ruling, it might be presented under Section 650 as it was before its amendment, upon one day's notice, at any time within thirty days after the entry of judgment; and the late Supreme Court held that a party was not bound to present his bill of exceptions under Section 649 at the time of the ruling, but had a right to have it settled, under Section 650, at any time within thirty days after the entry of judgment and within such further time as the Court below might grant by an order made before the expiration of the thirty days. (*Higgins vs. Mahoney*, 50 Cal. 444; *Caldwell vs. Parks*, 47 Id. 640; *Berry vs. N. P. C. R. R. Co.*, 50 Id. 435.)

The amendments of those sections were intended to regulate the right, not to destroy or limit it. As amended, they regulated the right of a party who had taken an exception to any decision made in the course of proceedings in a case, before final judgment, to have it settled within thirty days after the entry of judgment, or of service of notice of the entry of judgment, by following the course prescribed by Section 650.

It is contended, however, that Section 650, refers only to exceptions taken at the trial of a cause, and not to exceptions taken in the course of the proceedings before the trial has commenced, and that, as this was an exception taken to a decision rendered on a motion to set aside a default, it was not an exception taken "at the trial." Such an interpretation is one which seems to us to stick in the bark. A trial is the examination, before a competent tribunal, according to the law of the land, of the facts or law, put in issue in a cause for the purpose of determining such issue. When a Court hears and determines any issue of fact or of law, for the purpose of determining the rights of the parties, it may be considered a trial. Such an issue was presented on the application to set aside a default entered against the defendant. Upon that issue the Court heard and determined; and to the decision rendered exceptions were taken, which were settled as exceptions taken at the trial, in conformity to the provisions of Section 650. The time prescribed by that section is made to relate to the settlement of bills of exceptions taken to any decision made before or after judgment; for it is provided by Section 651, that exceptions taken to any decision made after judgment may be settled or noted as provided in Section 649, but a bill of ex-

ceptions may be presented and settled afterwards, as provided in Section 650. The time for the presentation and settlement of all bills of exceptions is therefore fixed by Section 650, and as the bill of exceptions in this case was presented and settled within that time, it constitutes a part of the record of the case.

Now it appears from the record that the attorneys of the parties to the action resided at Bodie, twenty miles away from the county seat of Mono county; that on the 20th of April, 1879, the defendant's attorneys forwarded to the Clerk of the Court to be filed, certain demurrers to the complaint, copies of which had been served on the plaintiffs' attorneys, together with notice that the demurrers would be called for argument on May 2, 1879. The demurrers were regularly delivered to the Clerk of the Court, on the 29th of April, 1879. He received them without demanding his fees for filing them. But about 6 o'clock p. m. of May 1, 1879, defendant's attorneys received a letter from the Clerk informing them that he demanded payment of his fees for filing the demurrers. On the morning of the 2d of May the attorneys left Bodie for the county seat and arrived there the same day about noon. Immediately upon their arrival they tendered to the Clerk his fees, but he refused to receive them, because he was then in the act of entering the defendant's default for not answering.

We think the District Court should have set aside a default entered under such circumstances. When the demurrers were placed in the custody of the Clerk, he had a legal right to refuse to file them, unless the fees for that service were paid to him. (Cal. Codes, stats. in force, Section 765; Section 4332, Pol. Code.) But he did not refuse, nor did he demand any fees then or afterwards for filing the demurrers. Three or four days after he received them for filing he demanded, by letter, "sixty-six dollars as fees on filing twenty-two demurrers in said case." But there was no law which allowed three dollars as a fee for filing a demurrer. The demand was, therefore, unauthorized by law. Having failed to demand his fees for filing the demurrers at the time they were delivered to him to be filed, or at any time thereafter, he waived his personal privilege of requiring prepayment. There is no question but that a Clerk of a Court may waive a right created by statute. (*Lick vs. Madden*, 25 Cal. 203.) When, therefore, the demurrers were brought and deposited with the Clerk for filing, they were, in contemplation of law, as to the defendant, on file in the case. A paper in a case is said to be filed when it is delivered to the Clerk, and received by him to be kept with the papers

in the cause. (*Engleman vs. State*, 2 Ind. 91.) Filing a paper consists in presenting it at the proper office and leaving it there, deposited with the papers in such office. Endorsing it with the time of filing is not a necessary part of filing. (*Bishop vs. Cook*, 13 Barb. 326.) When filed, it is considered an exhibition of it to the Court, and the Clerk's office in which it is filed represents the Court for that purpose. (*Lawson vs. Falls*, 6 Ind. 309.)

As the demurrers were before the Court, the default of the defendant for not answering was prematurely entered, and the Court should have set it aside. The defendant had a right to have the demurrers disposed of. It was the duty of the Clerk to have endorsed upon them the date of their filing. His omission of duty could not prejudice the defendant in any of its legal rights.

Judgment reversed and cause remanded, with direction to the Court below to dispose of the demurrers.

We concur: Morrison, C. J., Sharpstein, J., Myrick, J.

DEPARTMENT No. 2.

[Filed May 26, 1881.]

No. 10,636.

PEOPLE, APPELLANT, VS. GOLDEN, RESPONDENT.

MAYHEM—CRIMINAL LAW—BITING OFF EAR. To bite off the ear of a human being is mayhem.

Appeal from Superior Court, Colusa County.

Attorney-General Hart, for appellant.

Jackson Hutch, for respondent.

By the COURT:

The indictment charges that the defendant committed the crime of mayhem, by biting off with his teeth a portion of the left ear of one M., and thereby disabled and disfigured said ear.

The Penal Code, Section 203, makes the disabling or disfiguring of a member of the body of a human being mayhem. It is alleged in this indictment that the said M. is a human being, and that his left ear is a member of his body. We think that the allegations of the indictment are sufficient to constitute the crime of mayhem, and that the demurrer was improperly sustained.

Order reversed, with direction to the Superior Court of Colusa County to overrule said demurrer.

Pacific Coast Law Journal.

L. VII.

JULY 2, 1881.

No. 19.

Supreme Court of California.

DEPARTMENT No. 2

[Filed May 31, 1881.]

No. 7210.

REESE, APPELLANT, vs. HOECKEL, RESPONDENT.

SPECIFIC PERFORMANCE—DECREE—MORTGAGE—DAMAGES In case a party contracts to convey a certain title to land which, by reason of the existence of a mortgage upon it, he is unable to do, the Court will decree that he cause the land to be released from the mortgage, or in default thereof, that he secure the plaintiff from the payment of the same, and that he execute to plaintiff a sufficient conveyance of the land with a perfect title thereto. In an action for specific performance, if plaintiff has not been damaged, no damages will be allowed.

Appeal from Sixth District Court, Sacramento County.

Young & Robinson and Freeman & Bates, for appellant,
Add. C. Hinkson, for respondent.

By the COURT:

This action was brought to compel the specific performance of a contract by which the respondent, upon a sufficient consideration, agreed to convey by deed to the appellant a perfect title to a certain tract of land described in the complaint. The respondent could not, by reason of the existence of a valid mortgage upon the premises, convey a perfect title without first satisfying said mortgage and procuring its discharge. This he refused to do. We think that appellant is entitled to the relief prayed in his complaint, viz: "That the defendant cause the said tracts or lots of land to be released from said mortgage, or in default thereof, that he secure the plaintiff from the payment of the same, and execute to the plaintiff a sufficient conveyance of the said land with a perfect title thereto," but without damages—the jury having found against him upon that question. Judgment reversed, with directions that a judgment be entered in favor of the plaintiff, and against the defendant in accordance with the foregoing opinion.

IN BANK.

[Filed June 15, 1881.]

No. 7774.

WOOD, PETITIONER,
VS.BOARD OF ELECTION COMMISSIONERS,
RESPONDENT.ELECTION—CONSTITUTION—CHARTER OF MUNICIPALITY—REPEAL OF CHARTER
—CONSOLIDATION ACT OF SAN FRANCISCO—ASSESSOR—POLICE JUDGES
—CHIEF OF POLICE—EXTENSION OF TERM—OFFICERS HOLDING OVER.

Per SHARPSTEIN, J.—The Act of March 7, 1881, amending the Political Code (relating to elections) does not repeal the Act of April 2, 1866, as amended March 7, 1872, providing for the election of City and County officers in San Francisco. The present City and County of San Francisco is a continuation of the late municipal corporation known as the "City of San Francisco." Statutes of a general nature do not repeal by implication charters and special Acts passed for the benefit of particular municipalities. If the provisions of a city charter conflict with the general law upon the same subject, the provisions of the charter govern. The Act of March 7, 1881, applies to municipal corporations whose charters contain no provision in conflict with it. The title of the Act of March 7, 1881, is repugnant, so far as relates to elections, to the provision of the Constitution requiring that the subject of every Act shall be expressed in its title. The Consolidation Act of San Francisco is not affected by the provisions of the Political Code, and an amendment to such Code is to be treated, as far as concerns such Act, in the same light as if it formed a part of the Code at the time of its adoption. Municipal corporations organized before as well as after the adoption of the new Constitution are controlled by general laws—laws relating to such corporations or laws relating to subjects not provided for in the charters of such corporations. Section 7 of Article XI of the Constitution is prospective in its operation, and has reference to such city and county governments as may be merged into one municipal government after the Constitution had been adopted. The office of Chief of Police is not an elective office. The Police Judges are not to be elected at the same time as the city and county officers of San Francisco. The Assessor is not to be elected this year. With the exception of Police Judges, Chief of Police and Assessor, all the elective officers of the City and County of San Francisco are to be elected at the time fixed by the Acts of April 2, 1866, and March 30, 1872.

Per ROSS, J.—To postpone the election of officers of the City and County of San Francisco to 1882 would be to extend the terms of office of the present incumbents, and violate Section 9, Article XI of the Constitution. The Act of March 7, 1881, provides for a uniform system of elections for all elective county, city and county and township officers in the State, on the even-numbered years, commencing in the year 1882, and applies to San Francisco, as well as to every other part of the State; but it does not repeal the existing law requiring an election to be held in San Francisco this year. The effect of the Act of March 7, 1881, is to shorten the terms of officers elected this year. There is nothing in the Constitution forbidding the Legislature shortening the

terms of municipal officers. The City and County of San Francisco is subject to general laws passed by the Legislature.

McKINSTRY, J., AND THORNTON, J.—The Act of March 7, 1881, so far as it may operate to extend terms of office, is in conflict with Section 9 of Article II of the Constitution.

MORRISON, C. J.—There should be an election of municipal officers for the City and County of San Francisco this year. Neither the Assessor nor Police Judges are to be elected this year.

MYRICK J.—All officers including municipal, must be elected on even-numbered years. The Consolidation Act of San Francisco is in conflict with the Constitution requiring elections on even-numbered years. The terms of officers throughout the State, in 1880, expired on the first Monday after the first day of January, 1881: and where there have been no elections since, the incumbents hold over until the election or appointment of their successors.

McKEE, J.—The Act of March 7, 1881, harmonizes with the Constitution, is a general law, and is now the law of the land. It includes the City and County of San Francisco, and the provisions of the Consolidation Act in conflict with it are repealed. There is no law providing for an election of municipal officers in the City and County of San Francisco prior to 1882. The present incumbents continue in office until their successors are elected and qualified; their terms of office are not extended within the meaning of the Constitution.

Baggett, Metcalf, Ash and Quint, for petitioner.

Hoge, Clark, Barbour, Winans and Rosenbaum, for respondent.

McKINSTRY, C. J., delivered the opinion of the Court:

The question which has to be determined in this case is whether the special act of April 2, 1866, as amended March 1872, which fixes the time of holding elections for city and county officers of the City and County of San Francisco, is repealed by an amendment of the Political Code, approved March 7, 1881.

It is necessary in the first place to ascertain and determine the political status of the "City and County of San Francisco," under the Constitution and laws of this State. Section 1 of Article I, of the act of April 19, 1856, commonly known as "the Consolidation Act," declares that "The Corporation, or body politic and corporate, now existing and known as the City of San Francisco, shall remain and continue to be a body politic and corporate, in name and in fact, by the name of the City and County of San Francisco, and by that name shall have perpetual succession, may sue and defend in all Courts and places, and in all matters and proceedings whatever, and may have and may hold a common seal, and the same may alter at pleasure, and may purchase, receive, hold and enjoy real and personal property, and sell, convey, mortgage and dispose of the same for the common benefit." It then proceeds to define

the boundaries of said city and county, and transfers all the property and effects of both the late city and county to the corporation formed by the consolidation of both.

Section 6 provides for the election of officers for said city and county, and fixes their terms of office. This section has been repeatedly amended, but the provisions of the preceding sections have never been changed.

It is as clear as language could make it, that the present "City and County of San Francisco" is a continuation of the late municipal corporation known as the "City of San Francisco." Under the Consolidation Act, and the acts amendatory thereof, it is nothing more nor less than a municipal corporation, and the question whether a general law affects it or not must be solved by rules which have been established for determining when a general law does or does not apply to a municipal corporation. Ordinarily, a general law, when it relates to a matter concerning which no provision is made in the charter of a municipal corporation or any special act relating exclusively thereto, applies to such corporation the same as to any other political subdivision of the State. But "it is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities." (1 Dillon on Mun. Corp., Sec. 87.)

Such repeals are not favored. And it has accordingly been held that where the provisions of a city charter and the general law upon the same subject were conflicting and irreconcilable, the provisions of the former were not repealed by the latter. (*S. S. Bank vs. Davis*, 1 McCarter, 286; *State vs. Minton*, 1 Dutch. 529; *State vs. Clark*, Id. 54; *Walworth Co. vs. Whitewater*, 17 Wis., 193; *Janesville vs. Markoe*, 18 Id. 350; *State vs. Branin*, 3 Zab. 484.) And a clause in the general statute repealing all Acts and parts of Acts in conflict with it, although sufficiently comprehensive to include any repugnant provision of law wherever found, has been held not to repeal provisions of city charters which were repugnant to such general law. (*Walworth Co. vs. Whitewater*, *Janesville vs. Markoe*, and *State vs. Branin*, *supra*.)

It is true that in the title and in the body of the Act of 1881, city and county officers are mentioned in connection with county and township officers. But the significance of that is not so important as it might at first blush appear.

It is only in cases where the charter of a municipal corporation contains provisions, on a certain subject that a conflicting general law upon the same subject is inoperative, within such municipal corporation. If neither the Consoli-

tion Act nor any special statute relating exclusively to the City and County of San Francisco had provided at what time elections should be held for the officers of said city and County, the general statute upon that subject would have had the same force and effect within said city and County as it has elsewhere. It doubtless applies to municipal corporations whose charters contain no provision in conflict with that of the general statute upon that subject. And to none other, I think. (*State vs. Mayor*, 33 N. J. Law, 57; *Cross vs. Mayor*, 18 N. J. Eq., 305.) The reason of the rule is doubtless this: Whether a general law repeals a charter or other special act in conflict with it depends upon the intention of the Legislature; and the Courts have always assumed that if the Legislature intended by a general statute to divest a municipal corporation of any right, privilege or power conferred upon it by a special act, the latter would be in some way unmistakably referred to in such general statute. Perhaps a clause in the latter repealing all special acts in conflict with it might be sufficient. (*Bank vs. Bridges*, 30 N. J. Law, 112; *State vs. Morristown*, 33 Id. 57.) But in the absence of any reference whatever in the general statute to charters or municipal corporations or special acts relating exclusively thereto, the rule is well settled that the provisions of such charters and special acts are not affected by the provisions of a general statute repugnant thereto. (*Noy's Exams*, 19; *Gregory's Case*, 6 Co., 20.)

There is another circumstance which seems to me entitled to some consideration in the discussion of this question. The act of 1881 is entitled "An act to amend Section 4109 of an act to establish a Political Code," approved March 12, 1875, relating to the election of county, city and county and township officers, and to repeal Sections 4,024, 4,027 and 4,111 of said Political Code."

If it was the intention of the Legislature to amend or repeal the provisions of any other statute than that specified, it is difficult to conceive of a title more repugnant than this is to that provision of the Constitution which requires that the subject of every act shall be expressed in its title. The subject of this act, as expressed in its title, is the amendment and repeal of certain specified sections of the Political Code. That is its full scope and object, as expressed in its title. And as to any subject embraced in the act, and not expressed in its title, the act is void. (Const. Art. IV, Sec. 24.) If it was the intention to amend or repeal any of the provisions of any other statute or statutes, it should have been expressed in the title. If it is not, the Constitution limits its operation to the sub-

ject expressed in the title. *Expressio unius est exclusio alterius*. If intended to repeal or amend any special act relating exclusively to the city and county of San Francisco, no title could be more misleading, than the one chosen to express that intention. And the test which Courts, in determining whether the subject of acts were sufficiently expressed in their titles have applied to them, is whether such titles were of a character to mislead the public or the members of the Legislature, as to the subjects embraced in such acts. As I view it, the Legislature has not in the body of the Act of 1881 attempted to repeal the special act relating to the election of officers, for the city and county of San Francisco, and that if such intention were manifest in the body of the act, the failure to express it in its title, would render it void.

There is still another reason for holding that the Legislature did not intend by the passage of said general act to repeal said special act. The general act was intended to, and has become a part of the Political Code, and nothing in that Code can affect the provisions of the Consolidation Act or any act amending or supplementing it. (Pol. C., 19.) Upon this question the Code is to be construed as it would be if it had been originally enacted in its present form.

An impression, however, seems to prevail to some extent, that some of the provisions of the new Constitution have a bearing upon this question. Under the Constitution corporations for municipal purposes cannot be created by special laws, and those organized before as well as those which might be organized after the Constitution went into effect are subject to and controlled by general laws, i. e., general laws relating to such corporations, or relating to subjects not provided for in the charters of such corporations. (Const., Art. XI, Sec. 6.) A city or a city and county by becoming incorporated does not cease to be a component part of the State. It must have within it officers who will perform duties corresponding with those performed by county officers. This was clearly recognized by the Legislature which passed the Consolidation Act of the City and County of San Francisco. Section 4 of that act provides that "All the powers and duties of county officers, excepting those relating to Supervisors and Boards of Supervisors, so far as the same are not repealed nor altered by the provisions of this act shall be considered as applicable to officers of the said city and county of San Francisco, acting or elected under this act."

It is contended, however, that a general law fixing the time for the election of county officers applies to a consolidated municipal government because it is provided in Section 7 of

article XI of the Constitution that the provisions of it applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated government." This probably means that any provisions of the Constitution applicable to counties which are not inconsistent with any provision of the Constitution applicable to cities shall be applicable to a consolidated government, unless such provisions are prohibited to cities by the Constitution. But the provisions of this section are clearly prospective, and have reference to such city and county governments as might be merged into one municipal government after the Constitution went into effect. This is made apparent, not only by the language of that section, but more clearly so by a special provision in Section 6, applicable to cities incorporated and organized prior to the adoption of the new Constitution, to which the option is given to organize under general laws, when such shall be passed for their incorporation, or to continue to be municipal corporations under the charters or acts of incorporation passed prior to the adoption of the Constitution. This, as was said in *Smmond vs. Dunn*, 55 Cal., 242, is clearly implied, and it would require very plain language to convince me that such is not the intention of framers of the Constitution.

Neither the Act of April 2, 1866, nor of March 30, 1872, provides for the election of a Police Judge at the time of election of other officers of said city and county, and the office of Chief of Police is no longer elective.

Section 4109 of the Political Code, before the amendment March 7, 1881, contained a special clause in which the time of the election and term of office of the Assessor of the City and County of San Francisco are fixed. Neither as originally enacted or as amended does that section provide for the election of Assessor this year. It clearly follows that an Assessor is not one of the officers to be elected this year in said city and county.

With the exception of Police Court Judges, Chief of Police and Assessor, all the elective officers of the city and county of San Francisco must be elected at the time fixed by the acts of April 2, 1866, and March 30, 1872. I think the writ should be as prayed.

SHARPSTEIN, J.

CONCURRING OPINIONS.

I concur in the judgment. It is not denied by any one that there is now in existence a law requiring an election for elective municipal officers of the City and County of San

Francisco, to be held on the first Wednesday in September of the present year, unless the act of the Legislature adopted May 7, 1881, has repealed it.

It is obvious that to postpone such election would be, in effect, to extend the terms of the incumbent of those offices. To do this would be in direct violation of Section 9 of Article XI, of the Constitution, which declares that the term of no county, city, town or municipal officer shall be extended beyond the period for which he is elected or appointed. Therefore, if the aim of the Act of 1881 was to postpone the election for the elective municipal officers of the City and County of San Francisco, it would fail in such purpose, because contravening the Constitution of the State. But I do not understand that such was the object of that act, but rather that it was to provide for a uniform system of elections for *all* elective county, city and county and township officers in the State on the even-numbered years, commencing in the year 1882.

In my opinion this act relates to the City and County of San Francisco as well as to every other part of the State, but, upon well-established principles, it repeals only such portions of the existing laws upon the subject to which it relates as conflicts with its own provisions. I see no conflict between the Act of 1881 and the law requiring an election to be held in the City and County of San Francisco in September of the present year. The Act of 1881 provides for a general election in the year 1882, and every second year thereafter, of all elective county, city and county and township officers, except Superior Court Judges, Superintendents of Schools, and Assessors. The effect of this legislation will be to shorten the terms of such officers as shall be elected the present year under existing laws, inasmuch as the terms of such officers are, under such laws, fixed at two years. But there is nothing in the Constitution forbidding the Legislature shortening the terms of such officers. To the extent of this conflict, but only to that extent, is the old law repealed by the new. Hence I conclude that under the Act of April 2, 1866, as amended March 7, 1872, there must be held on the first Wednesday in September of the present year an election for the elective municipal officers of the City and County of San Francisco; that the terms of the officers so elected will extend to the first Monday after the first day of January, 1883, when they will be succeeded by such officers as may be elected at the general election to be held in the year 1882, under and by virtue of the Act of the Legislature approved May 7, 1881.

I think it proper to add the reasons which lead me to say that the Act of May 7, 1881, applies to the City and County of San Francisco as well as to all other parts of the State. Section 6 of Article XI of the Constitution provides that "incorporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which may be altered, amended or repealed." These provisions are clearly prospective; but the framers of the Constitution, recognizing the fact that there were municipal corporations already in existence, proceeded, in the same section, to provide as follows: "Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." And by the succeeding section the provisions of the Constitution, applicable to cities, and also those applicable to counties, so far as not inconsistent, or not prohibited to cities, are made applicable to consolidated city and county governments. Accordingly, it was held in *Desmond vs. Dunn*, 55 Cal. 242, that the Consolidation Act of 1881, which provided that the City and County of San Francisco cannot be vacated or reorganized by any general act of incorporation until a majority of the electors of the City and County of San Francisco shall so determine to become organized under such general act. But the City and County of San Francisco cannot be compelled to surrender its present charter for one it does not desire, as was decided in *Desmond vs. Dunn*, and cannot be reorganized by special legislation under the guise of laws relating to cities, or cities and counties containing a population of more than 100,000 inhabitants, as was decided in *Earle vs. Board of Education*, yet the City and County of San Francisco remains a subdivision of the State, and is not entirely free from Legislative control; for in the same section of the Constitution, in which the then existing city and town organizations are recognized, and the continuance of their existing charters permitted, it is declared that "cities or towns heretofore * * * organized * * * shall be subject to and controlled by general laws." Unless this was the case in the matter of elections—for instance, the question before us in the present case—none ever could be held in the City and County of San Francisco on the even-numbered years, so long as the present charter of that city and county remains in force; for by it the elections are required to be held on the odd-numbered years. Yet the Constitution, in Section 5 of

Article XI, declares that "the Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of Boards of Supervisors, Sheriffs, County Clerks, District Attorneys, and such other county, township and municipal officers as public convenience may require; and shall prescribe their duties and fix their terms of office." Pursuant to this mandate of the Constitution, and by virtue of the power thus conferred, the Legislature passed the Act of May 7, 1881. That Act does not purport to be limited on its face, nor, in my opinion, is it so in its operation; but it is a general and uniform law upon a subject expressly committed to the Legislature by the Constitution itself, and upon which the Legislature was, by the Constitution, commanded to act—not for all the State *except* the City and County of San Francisco, but for the whole State, including that city and county, in order that there might be a uniform system of elections throughout the State for the elective officers.

ROSS, J.

I concur in the judgment. In my opinion the Act of May 7, 1881, in so far as it may operate to extend for a definite period the terms of office of the officers named in Section 9 of Article XI of the Constitution, contravenes the last clause of that section.

McKINSTRY, J.

I concur in the opinion of McKinstry, J.

THORNTON, J.

I concur in the conclusion that there should be an election of municipal officers within and for the City and County of San Francisco in September of the present year, but upon the question whether or not the Act of 1881 applies to said city and county, I express no opinion, as I do not deem it necessary to pass upon that question in this case. I also concur in the opinion of Mr. Justice Sharpstein, that neither the Assessor nor Police Judges are to be elected this year.

MORRISON, C. J.

DISSENTING OPINIONS.

In dissenting from the judgment of the Court in *Barton vs. Kalloch*, I took occasion to express the view that, according to the Constitution of this State, the elections of all officers, whether State, county, township, or municipal, were to occur on the even-numbered years—whatever may be the length of the terms respectively. I see no reason for chang-

the views then expressed. It necessarily follows, in my opinion, that no election for any officer can be held in the year 1881; that no election can be held until the Tuesday after the first Monday in November, 1882. In San Francisco the "Consolidation Act" remains in force, except as to such parts as are in conflict with the Constitution. It is in conflict with the Constitution as to the time of holding elections and as to the commencement of the terms of office. It may be asked, when did the terms of office of persons throughout the State, holding county, township, and municipal offices in 1880, expire? I think the Constitution answers the question, viz.: On the first Monday after the first day of January, 1881, and where there were no elections successors, the incumbents are in office holding over, awaiting the election or appointment of successors.

MYRICK, J.

dissent. The Act of 1881, referred to in the prevailing opinion, is a general law enacted by the Legislature in pursuance of the provisions of Section 5, Article XI, of the Constitution, for the purpose of bringing elections throughout the State into harmony with the provisions of the Constitution, which require that all elections shall be held in even-numbered years. That such was the intention of the Legislature in passing the Act is evident from its language. The Act took effect immediately upon its passage, and it is in harmony with those provisions of the Constitution which it is intended to enforce, the law of the land. There can be no doubt that, by its terms, it includes the City and County of San Francisco. The provisions of the Consolidation Act of the city which are in conflict with it, must therefore give way to it, for, as a general and uniform law intended to enforce the provisions of the Constitution, it has superseded and annulled all previous regulations—general or special—on the same subject. That being the case, there is not, in my judgment, any law which authorizes an election to be held in the City and County of San Francisco until the year 1882. The question of public convenience is not involved in the case. Legally, however, the public will suffer no inconvenience. Those in office, although the terms of office for which they were elected have expired, are entitled to continue to discharge the duties of their offices until their successors are elected and qualified. A temporary incumbent *de jure* officer, and his term of office is not extended within the intent and meaning of the constitutional provision referred to by Justice Ross.

McKEE, J.

IN BANK.

[Filed June 14, 1881.]

No. 7502.

ANASTACIO FELIZ ET AL., RESPONDENTS,
VS.
CITY OF LOS ANGELES, APPELLANT.

LOS ANGELES RIVER—APPROPRIATION—CITY OF LOS ANGELES IS SUCCESSOR TO THE PUEBLO. In a contest relating to the use of the waters of Los Angeles River, it appeared that the defendant and its predecessor had exercised control of, and had the exclusive right to the use of, the waters of the river since the year 1781; and that such right had always been recognized, acknowledged and allowed by the owners of land at its source and bordering upon its banks, including the grantors of plaintiffs; and that such use continued down to within two or three years prior to the bringing of this action, when the plaintiffs claimed adversely: *Held*, plaintiffs could not enjoin defendant from obstructing them in the use of so much of the water as was necessary to supply the needs of the inhabitants of the city with water. The city of Los Angeles has succeeded to all the rights of the pueblo of Los Angeles.

Appeal from Superior Court, Los Angeles County.

Judson, Howard, Brosseau and Chapman, for respondents.
J. F. Godfrey, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

The appeal in this case has been presented to the Court on the judgment roll. This suit was brought by the plaintiffs against the City of Los Angeles, and the contest relates to the right to the use of the waters of the Los Angeles River, the plaintiffs claiming the right to use the same under an appropriation alleged to have been made by them or their grantors, in the year 1844, and the defendant claiming the exclusive right to use the same for a period extending as far back as the year 1781. On the trial in the Court below, judgment passed in favor of the plaintiffs, and an injunction was ordered against the city and its agents, etc., as prayed for in the complaint.

The plaintiffs are the owners of certain tracts of land described in their complaint, which are bounded on the easterly side by the Los Angeles River, and since the year 1844 they have used the waters of said river, through certain ditches constructed by them or their grantors, for the purpose of irrigating their said lands. In the month of May, 1879, the water in said river (in consequence of the use and diversion thereof by plaintiffs) became so reduced and diminished

quantity that a sufficient quantity thereof did not flow down the river below plaintiffs' ditches, to supply the wants of the city, and thereupon the said city, by its officers and agents, entered upon said ditches at their heads, and returned the water that was flowing through the same, to the bed of the river, and the city has ever since held possession of said ditches, and prevented the waters of the river from flowing therein, and has prevented the plaintiffs from using the waters of said river.

The loss of the water is the grievance complained of; and, after finding that the plaintiffs were entitled, as riparian owners, to divert a reasonable amount of the waters of the river for irrigation and domestic use, the Court "ordered, adjudged and decreed that the defendant, The City of Los Angeles, its successors, agents, officers and attorneys, are perpetually enjoined and restrained from in any wise interfering with the ditch, or in any wise hindering or interfering with the said plaintiffs, or either of them, in their appropriation of a reasonable quantity of the waters of the aforesaid river, and using the same upon their said respective parcels of land for the purposes of irrigation and domestic uses."

The following are the findings upon which the above decree was founded:

"First—That in the year of 1781, pursuant to the laws of Spain and the rules and regulations providing for the government of the provinces of California, Los Angeles was duly formed into a pueblo, and became entitled to all the rights of a pueblo according to said laws, rules and regulations, and all its rights as such pueblo since then were duly recognized and allowed by the Spanish and Mexican governments during their respective occupations and control of the same, and also by the respective provincial and departmental authorities of California.

"Second—That the River of Los Angeles rises several miles above the former pueblo of Los Angeles, and runs down through said pueblo; and during the occupation and control of said pueblo by the Mexican government, the municipal authorities at all times exercised control of, and claimed the exclusive right to use the waters of said river, and all thereof, which right was duly recognized, acknowledged and allowed by the owners of the land at the source and bordering on said river, including the grantors of the plaintiffs; and that ever since the occupation and control of said pueblo by the government of the United States and of the State of California, the municipal authorities of what is now the City of Los Angeles have exercised the same con-

trol and claimed the same rights in regard to the waters of said river as was previously done by the authorities of said pueblo, except within the last two or three years, when the right of said city to said waters has been disputed by the plaintiffs and others, and a right claimed by them to use said waters; that the municipal authorities of said pueblo and said city exercised control of said waters, and claimed the exclusive right to their use as aforesaid for the purpose of irrigating the lands of said pueblo and city, and for the domestic use of the inhabitants thereof.

"Fifth—That the water of said river is necessary for the irrigation of the land within said city, and so confirmed as aforesaid, and also for the domestic use of its inhabitants; but until within the last two or three years all of said water has not been required in said city. For the last few years, during the irrigating season, all of said waters, as they naturally flow in said river, have not been sufficient for the irrigation of the irrigable portion of said lands and the domestic use of said inhabitants; and said city, at an expense of more than \$100,000, has constructed reservoirs to husband and save said waters for uses in said city; that a large portion of the irrigable lands of said city are not irrigated, and never have been irrigated, which will require more than all the waters of said river, with the present facilities and resources of said city for husbanding and supplying the same; that said city has been supplying the inhabitants of said city with said water for the uses aforesaid, and when there has been more than has been required for use in the city, it has and still does sell to parties residing without, and to be used on lands without the city.

"Sixth—That ever since about the year 1844 the plaintiffs and their grantors have owned, possessed and cultivated the land claimed by them in their complaints, and have ever since irrigated the same from said river, through the respective ditches mentioned in the respective complaints—to-wit, the Chavez and Feliz ditches—to about the same extent as now irrigated by the plaintiffs, using the waters, also, for domestic purposes; and the waters of said river are necessary for the irrigation of said lands, and for domestic use. But the uses of said waters were originally by permission and under consent from the municipal authorities of said pueblo, and have ever since been with such permission and consent, and not adversely nor claimed as of right until within the last three years, during which time (the last three years) plaintiffs have claimed and still claim the right to use said waters on their land, and for domestic purposes.

Seventh—That plaintiffs are the respective owners of the tracts of land claimed by them in their complaint, and the respective ditches therein referred to are used and are necessary to irrigate the same; and said ditches have always been in the exclusive possession and control of said plaintiffs and their grantors from about the year of 1844 until the twenty-first day of May, 1879.

Eighth—That on the twenty-fifth day of May, 1879, the plaintiffs were respectively, and for several days prior thereto, diverting through said ditches, to the extent of about one hundred square inches in each of said ditches, the waters of said river to and upon their respective tracts of land aforesaid, and using the same thereon for irrigation and domestic purposes, and the same was no more than was reasonable and necessary therefor. By reason of such uses by plaintiffs, water became diminished in said river, and sufficient thereof could not and did not reach said city or its water works (plaintiffs' said ditches having their points of diversion above said city and its water works) to supply what was reasonable and necessary for irrigation and domestic use in said city; and by reason of such diversion by plaintiffs, a number of the inhabitants of said city were deprived of what was reasonable and necessary for the irrigation of their land in said city, and for their domestic purposes; and the defendant city lost on its sale of said waters more than \$50 on account of the diversions in each of the ditches respectively. Whereupon on that day, and in order to supply the inhabitants and land of said city with sufficient water for said purposes, and in order to regulate and control the distribution of said waters in the most beneficial and regular manner, the said city, by its officers and agents, entered upon said ditches at their respective heads and returned the water therein to said river, and placed therein head-gates."

From the foregoing findings it appears that the pueblo of Los Angeles was established by the Mexican government as early as the year 1781—just one century ago—and that during the occupation and control of said pueblo by the Mexican government, the "municipal authorities exercised control thereof, and claimed the *exclusive* right to use the waters of Los Angeles River, and all thereof, which right was duly recognized, acknowledged and allowed by the owners of the land at the source and bordering on said river, including the grantors of the plaintiffs," and that down to the period of three or three years last past the municipal authorities have continued to exercise the same control, and have claimed

the same rights with respect to the waters of said river was previously done by the pueblo. It further appears from the findings in the case that the use of said waters by the plaintiffs and their grantors was, in its origin, by permission and with the license and consent of the municipal authorities, and that such use has ever since been with the permission and consent of said authorities, and not adverse nor claimed as a right until within the last three years, during which time (the last three years) plaintiffs have asserted an adverse claim to said waters.

Thus it will be seen that for nearly one hundred years the City of Los Angeles has asserted a claim to all the waters of the Los Angeles River, and such claim has been recognized by all persons interested, from the head of the stream along its banks, including the plaintiffs and their grantors. We say including the plaintiffs, because it appears from the sixth finding that the use of the waters of the river was under the license, permission and consent of the defendants until within the last two or three years.

It was conceded on the argument that the city had appropriated a portion of the waters of the Los Angeles River before the plaintiffs constructed their ditches, and that the use by the city to the extent of such appropriation could not be interfered with by any subsequent appropriation; but it was contended that the rights of the city were limited to the amount appropriated at the time plaintiffs or their grantors built their ditch. Such a construction of the defendants' rights would not be in harmony with the facts found by the Court. From the very foundation of the pueblo in 1781, the right to all the waters of the river was claimed by the pueblo, and that right was recognized by all the owners of land along the stream, from its source, and, under a recognition and acknowledgment of such right, plaintiffs' grantors dug their ditches, and, by the permission and consent of the municipal authorities, plaintiffs thereafter used the waters of the river. Can they now assert a claim adverse to that of the city? We think not. The city, under various acts of the Legislature, has succeeded to all the rights of the former pueblo. (Act approved April 4, 1850; Statute of 1854, 205; Statute of 1857, p. 329.)

We have not examined the rights of the defendant as they existed under the Spanish and Mexican laws applicable to pueblos, for the findings in this case render such examination unnecessary.

From the fifth finding it appears that when the acts complained of were done by the officers and agents of the

lant, *all* of the waters of the Los Angeles River were required, and were not sufficient to supply the wants of the city; and we are of the opinion that it was the right of the municipal authorities to prevent any diversion of said waters at any time by the plaintiffs.

We do not intend to be understood as holding, nor do we hold, that the city has the right at any time to dispose of the river for use upon lands situated without its limits, to the injury of the plaintiffs or other owners of land bordering on the river. On the contrary, we are of the opinion that the city has not that right. But, as observed already, the findings in this case show that at the time of the acts complained of there was not sufficient water in the river for the needs of the inhabitants of the city; and we hold that, to the extent of the needs of its inhabitants, it has the paramount right to the use of the waters of the river, and the further right, to be exercised and recognized, as appears from the findings, to manage and control the said waters for those purposes. The judgment reversed, and the Court below is instructed to render judgment in favor of defendant upon the findings. We concur: Myrick, J., McKee, J., Ross, J., Sharpstein, Thornton, J.

IN BANK.

[Filed June 15, 1881.]

No. 6370.

WHARTENBY, APPELLANT,

VS.

TOOMEY ET AL., RESPONDENTS.

JUDICIAL NOTICE—FINDINGS—RECORD. If the record does not show that the findings are not sustained by the evidence, the judgment will be affirmed.

Appeal from Twelfth District Court, San Francisco.

Mastick & Mastick, for appellant.

Curry & Evans, Delaney and Thomey, for respondents.

By the COURT (Thornton, J., dissenting):

The Court below found as a fact that at the time Toomey made the gift to his wife he was solvent, and that in making the gift there was no intention to hinder, delay or defraud any creditor of Toomey. From the record we cannot say that the findings were not sustained by the evidence. The judgment and order affirmed.

Mr. Justice McKinstry took no part in this decision.)

DEPARTMENT No. 1.

[Filed June 15, 1880.]

No. 6682.

DRESBACH ET AL., RESPONDENTS,
VS.THE CALIFORNIA PACIFIC RAILROAD COMPANY
APPELLANT.

COMMON CARRIER—TERMINUS OF ROUTE—AGENTS—NEGLIGENCE—EVIDENCE—
Plaintiffs shipped by defendant, a common carrier, grain sacks
San Francisco destined for Jacinto, in Colusa County. Defendant
claimed that its route terminated at Knight's Landing. *Held*,
the evidence in the case supported a finding by the jury that defen-
dant's route extended to Jacinto. *Held further*, there being evidence
showing that defendant had agents at Jacinto for the purpose of re-
ceiving goods at that point, and through the negligence of such agents
the sacks were lost, that defendant was liable to plaintiffs.

Appeal from Third District Court, San Francisco.

Wilson & Wilson, for Appellant.*G. F. and W. H. Sharp*, for Respondents.

Ross, J., delivered the opinion of the Court.

This action was brought to recover damages for the alleged
loss by defendant of certain grain sacks shipped by the plain-
tiffs at the City of San Francisco over defendant's road,
destined for Jacinto, in Colusa County. The complaint
charged that the defendant was at the times therein men-
tioned a common carrier of goods for hire, between San
Francisco and Jacinto, and that the plaintiffs delivered to
defendant, between the 11th of June and the 23d of July
1874, the sacks for transportation to the point named,
paid the freight thereon, and that defendant failed in its duty
as common carrier, by which failure the goods were lost to
the plaintiff's damage.

The defendant, by its answer, denied that it ever was
common carrier between San Francisco and Jacinto, and
averred that its route on that line terminated at Knight's
Landing; denied that it received the goods in question for
transportation to any point beyond Knight's Landing, and
which point, it averred, it safely transported them, and that
it delivered the same to the Central Pacific Railroad Company
a competent carrier, carrying to Jacinto, the place of destination.

There is no dispute about the fact that the sacks were
safely carried by the defendant to Knight's Landing, and
were there placed on board the boat "Governor Dana,"

which they were safely transported to Jacinto, at which point they were placed on the bank of the river at the landing. From this place it appears they were lost.

There was no evidence of any special contract on the part of the defendant to carry the sacks to any point beyond its own route. If, therefore, its own route terminated at Knight's Landing, its liability ceased when it carried the goods to that point and delivered them in safety on board of the boat "Governor Dana." (Civil Code, Sec. 2201.) But the defendant's route terminate at Knight's Landing, was one of the important issues in the case. It is contended by the counsel for appellant that the affirmative of this proposition is indisputably shown by the evidence. We do not think that can be fairly said from the record before us. It is true that Mr. Gunn, the secretary of the defendant, testified explicitly that at the time of the transaction in question the defendant's route ended at Knight's Landing, and that the boats plying on the Sacramento River between that point and Jacinto were owned and operated by the Central Pacific Railroad, a separate and distinct corporation. And there is other testimony corroborative of this statement. But there was other testimony still going to show that the defendant operated and had control of the entire route from San Francisco to Jacinto. Thus: shortly after the goods in question were shipped, Capt. Foster, who, it is shown, had charge of the boats plying between Knight's Landing and Jacinto, wrote the following letter to one of the plaintiffs:

"OFFICE OF THE CALIFORNIA PACIFIC RAILROAD COMPANY, }
SACRAMENTO, July 24, 1874. }
A. Bullard, Esq., Chico—DEAR SIR: Yours of 20th instant, relating to agent at Jacinto, is received. Galland & Aronson are agents for the company at Jacinto to the extent of receiving and delivering goods, collecting bills, etc. Communications relating to business, other than the above, should be addressed to me at Sacramento, or to J. C. Stubbs, General Freight Agent, San Francisco. Yours, truly,
(Signed) ALBERT FOSTER."

There is a letter from the agent having control of all the boats plying between Knight's Landing and Jacinto, in response to a letter from one of the plaintiffs (and in respect to this very freight), entitled "Office of the California Pacific Railroad Company," and in which he informs Bullard that Galland & Aronson act as agents for the company (the California Pacific Railroad Company) at Jacinto to the extent of receiving and delivering goods, collecting bills," etc. In

addition to this, several witnesses testified that for goods shipped by the boats from Jacinto, and other points beyond Knight's Landing, receipts were usually given in the name of the California Pacific Railroad Company, and that the money for such freights, as well as for passage from these points, was paid to the California Pacific Company. This testimony was sufficient to sustain the finding, involved in the verdict of the jury, that the route of the defendant extended to Jacinto.

It is next urged for the appellant that, if this be true, the goods in question were delivered at Jacinto, in the manner usual at that place. Jacinto, it appears, was, at the time referred to in the record, a small landing place on the Sacramento River, having less than twenty inhabitants. The consignees of the goods resided some miles from there. And there was testimony given at the trial that it was customary, in delivering freight at Jacinto, to place it on the bank of the river, whether the consignee was present or not. Whether a deposit of the goods in this manner would have been a good delivery, if there was nothing else in the case on that subject, need not be determined, for the reason that there is testimony in the record going to show that the defendant had agents at Jacinto for the reception of goods consigned to that place, whose duty it was to receive them. The letter from Foster, already quoted distinctly, states that "Galland & Aronson act as agents for the company at Jacinto to the extent of receiving and delivering goods, collecting bills, etc." There is other testimony in the case which, though evasive, also tends to show not only that Galland & Aronson were agents for the defendant at Jacinto, for the purpose of receiving and delivering goods, but that they had a freight-house there, in which freight, other than their own, transported by the defendant, might have been, and sometimes was, put. We extract from the testimony of Alley, who was clerk on the "Governor Dana" at the time the plaintiffs' goods were shipped:

"Q. Were not Galland & Aronson the agents at Jacinto for the purpose of receiving and delivering goods at that point? A. Were they not what?

"Q. Were they not agents of the company at Jacinto for the purpose of receiving and delivering goods at that point? A. I never understood that they were agents of the company, more than collecting bills; that is all.

"Q. Only collecting bills? A. That is as far as their agency extended, to my knowledge. I never knew they had any authority to act as agent otherwise.

'Q. Whom did you get that from, and where? A. Well, I not know where I got it from; that is the general impression that I had. I do not know as any one told me so.

'Q. Captain Foster would know more about their position towards the company than you would, wouldn't he? A. Yes, sir; he would be apt to.

'Q. They did used to take a hand sometimes in receiving goods up there, didn't they? A. Well, I cannot say that they ever did, only this way: that they would almost always receive goods of their own.

'Q. I am speaking of other people's goods. A. No, sir. Well, many, many times—they had not done so many times.

'Q. I suppose so; they may have been off to Chico, but have they not done so sometimes? A. Have not they received there?

'Q. Received goods belonging to other people there at Chico? A. How do you mean—give a receipt for the goods?

'Q. No; they don't have to give receipts to receive goods here there are only five men in a town? A. They have received goods this way. I have said to Aronson, 'There is Rand-So's goods;' for instance, 'There is Papst's goods,' 'Mudd & Mitchell's goods;' and he said, 'All right.' That was all the reception there was.

'Q. That is enough for me. They used to receive money there, too, didn't they? A. Yes, sir; they have collected money for the company.

'Q. They were generally at the landing—on the bank, as we call it—when these boats arrived? A. It cannot be otherwise, because their goods came right to the landing where their freight-house was.

'Q. That had to be? A. They had to be there; their freight-house was right on the edge of the river.

'Q. You have never put other people's freight besides theirs in that little house, have you? A. Yes, sir.

'Q. That belonged to the neighborhood round about? A. Yes, we have put it in. They have not asked us to do, nor told us to do it.

'Q. The company has done it? A. We have done so for this reason: We would say, we do not want to leave them out on the bank, and we will put it in your warehouse, we would

'Q. That is very reasonable. How often have you done that little thing? A. Well, I cannot tell how often; a number of times.

'Q. Did you ever call Aronson out when these bags were

being delivered, or any bags, and count them out to him? A. Yes, sir. I looked round for him once to count a lot of bags for a consignee, but I could not find him. I wanted him to do it to satisfy the consignee that we had delivered the goods correctly. I could not find him; he was not there.

"Q. I am asking you, when you have been discharging freight at Jacinto, whether you have not called Aronson to come and overlook the count? A. I have done so; yes, sir."

If the defendant had agents at Jacinto for the reception of goods consigned to that point, and such agents neglected to receive and care for the plaintiffs' goods, and by reason of such neglect the goods were lost, the defendant is undoubtedly liable therefor.

On the question of fact involved, the finding was against the defendant. We cannot say it was not correctly so. Those facts being thus determined, judgment went properly for the plaintiffs.

Judgment and order affirmed.

We concur: McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 7668.

NEWMAN, PETITIONER,

vs.

SUPERIOR COURT OF SAN FRANCISCO, RESPONDENT.

CERTIORARI—APPEAL—ORDER AFTER JUDGMENT—PREFERRED CREDITORS.

An order after recovery of judgment by petitioner that money held by the Sheriff under attachment process in the action, to be paid over to preferred creditors of the defendant, is a special order made after final judgment, and appealable. Certiorari will not lie where there is a remedy by appeal.

Certiorari.

Drake, for petitioner,

Boyce, for respondent.

By the COURT:

The order of the Superior Court of San Francisco, which the petition asks to have reviewed upon a writ of certiorari, is a special order, made after final judgment, in the case of *Mohle vs. Tschirtch*, from which an appeal is allowed by Sub. 3, Section 939, C. C. P. When an appeal may be taken a party is not entitled to a writ of certiorari.

Application for writ denied.

IN BANK.

[Filed June 14, 1881.]

No. 6556.

ROBINS ET AL., APPELLANTS,
 VS.
 HOPE ET AL., RESPONDENT.

QUITY—TITLE TO LAND—A PERSON IS BOUND TO KNOW HIS OWN TITLE—DEED—MISREPRESENTATIONS—AGENCY—FIRST COUSIN—FIDUCIARY RELATION—TRUST—PARENTS—CONSIDERATION. A person is conclusively presumed to know the state of his own title to real property when dealing with another who occupies no fiduciary relation toward him: *Held*, accordingly, that plaintiffs could not avoid a deed executed in confirmation of a prior one made by their mother, as guardian, on the ground of false representations made by defendants' testator or the agents of the latter, to the effect that plaintiffs had no title—the plaintiffs at the time believing that they had no title and that the conveyance by their mother, as guardian, had passed their interest and title to defendants' testator. That the agent of defendants' testator made representations to parents of plaintiffs, over whom he had great influence, which were communicated by the parents to plaintiffs—the parents not having been employed by the testator or his agent to procure a deed from plaintiffs—does not show the existence of such confidential relations as would make the parents the agents of the testator or bind him by their acts or misrepresentations. First cousins deal with each other at arms' length; a representation made by a first cousin stands upon the same footing as if made by a stranger. That plaintiffs received no consideration for a deed executed to confirm one previously made by their guardian matters not, if the guardian received full value at the time of the execution of the first deed; and the lack of consideration to plaintiffs would not militate against the *bona fides* of the execution of the second deed. It is no good ground of objection that a deed had not been read or its contents explained if a party does not express a desire to have it read or the contents explained; but, *Held*, in this case, that the reading of the deed and explanation of its contents would not have been of any importance, so long as plaintiffs believed they had no title to the land, but were merely confirming and ratifying a sale and conveyance of it previously made by their mother, as guardian, which they considered valid and binding upon them.

Appeal from First District Court, Santa Barbara County.

Gregory, Woodside & Delmas, for appellants.

Richards & Fernald, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

The gravamen of the complaint is that the plaintiffs were induced to convey, without consideration, their interest in certain real estate to one Thomas Hope, the testator of the defendants, by reason of its being falsely represented by the agents of said Hope to the plaintiffs that they had no valid claim or title to said real estate, and that said Hope had a perfect title thereto, and that he desired a deed from them

merely confirmatory of one previously executed by the mother, as their guardian, to him, which the plaintiffs supposed, at the time of making their said conveyance, and several years thereafter, and which the agents of said Hope assured them, was a valid deed, and that all their right, title, interest and claim in and to said real estate had there been effectually transferred to said Hope; and that relying upon said representations the plaintiffs executed the deed which they now seek to avoid without taking any independent counsel or advice, or having it read, (they could not read it), or its contents explained to them.

The misrepresentation complained of was as to the title of the plaintiffs to the premises which they were induced to convey under the impression that they had no title there and we understand the rule to be, as stated by the learned Judge who sustained a demurrer to this complaint, that a person is conclusively presumed to know the state of his own title to real property. This is always the case where a party deals with a stranger, as in the present case. No misrepresentations made by Hope or his agents, therefore, as to the proceedings in probate concerning plaintiffs' title, or to the state of their title in any respect, could have had the effect of misleading them." And the learned counsel for the appellants, if we rightly apprehend his position, conceals the rule to be as above stated.

"But, this rule," he insists, "applies only where parties deal at arms' length, and where the means of information are equally open to both. It cannot be invoked where confidential relations exist between the parties."

It will thus be seen that it is only upon the question of the relations which exist between the parties, that the Court below and the learned counsel for the appellants differ. The Court held that the relation of Hope to the appellants was that of a stranger. The counsel insists, if we do not mistake his position, that conceding that to be so, the deed was procured through misrepresentations of Hope's agents, between whom and the appellants confidential relations did exist, the transaction must therefore be viewed in the same light as it would be, if such relations had existed between Hope and the appellants, and he, instead of said agents, had made the misrepresentations complained of. Whether under the maxim, *qui facit per alium facit per se*, a principal must be held to adopt the relations which exist between his agent and those with whom he is transacting business through such agent, may well be doubted. But does it appear that confidential relations did exist between Hope's agents and

appellants? One of those agents was Albert Packard, a practicing lawyer, and he, some three or four weeks prior to the execution of the deed, which the appellants seek to void, "visited Z. Branch, the father of F. Branch, then and now being the husband of the said plaintiff, Concepcion Branch, at their place of residence in the County of San Luis Obispo, and also said Encarnacion (the mother of the plaintiffs), all of whose confidence he possessed to an almost unlimited extent, and over whom he exercised a great influence," and then and there made the misrepresentations contained of, to the persons above named, who repeated them to the plaintiffs. Now it is alleged that Z. Branch and F. Branch—one the father-in-law, and other the husband, of one of the plaintiffs (four of the five plaintiffs are married women) and the mother of the plaintiffs had almost unlimited confidence in said Packard, and that he exercised great influence over them. Does that show that a confidential relation existed between Packard and the appellants, or even between him and the three persons to whom he directly made the alleged misrepresentations? The phrases "confidential relation" and "fiduciary relation" seem to be used by the courts and law writers as convertible terms. It is a peculiar relation, which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, exors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these and the like cases, the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which the relation naturally creates, requires the utmost decree of good faith (*berrima fides*), in all transactions between the parties." Story's Eq. Jur., 218). If there is an allegation of the existence of any peculiar relation between Packard and the appellants, or between him and the persons to whom he is alleged to have made misrepresentations respecting the title of the appellants to the land which they conveyed to Hope, it has escaped our observation. There is nothing peculiar in the alleged relation between Packard and the persons to whom he is alleged to have made misrepresentations, and it is not alleged what relation, if any, existed between him and the appellants. It is alleged generally that the persons to whom he made the misrepresentations had almost unlimited confidence in him, and that he had great influence over them, but why that was, or would naturally be so, is not apparent.

Certainly no relation is shown to have existed between him and them from which the law would infer such confidence and influence. It is not claimed that Z. Branch, F. Branch, or the mother of the appellants, were ever employed by Hope, or even by Packard to procure or to aid any one in procuring a deed from the appellants. So that whatever else Hope may be held responsible for, he cannot be held responsible for their acts or misrepresentations. They were in no sense his agents.

It is alleged that one Charles W. Dana, a "first cousin" of the appellants, was also employed by said Hope to procure said deed, and that he brought the same to the appellants already prepared for their signatures, and that he possessed the entire confidence of the appellants, "and understood well the English language in which the deed was written, which neither of the plaintiffs did, and then and there (he being himself deceived as plaintiffs believe) represented to the plaintiffs that they had no right or interest in or claim to the said rancho; that their mother had, as guardian, sold all their interests therein to said Hope, and that they had no claim or hope to recover the same back; that he, the said Hope, had already a good title to the said property; that there was no actual necessity of such a deed from them to Hope, but that he, Hope, was old, foolish and childish, and wanted their deed confirming the sale so made by their said guardian, but that their (plaintiffs') signatures thereto would amount to nothing."

It has never been held, as far as we are advised, that the relation of first cousin is a peculiar one, or that first cousins do not deal with each other at arms' length. It is not a relation which would naturally inspire unlimited confidence, affection or sense of duty on either side. But if no relation existed between Hope and the appellants which would render the deed executed by them voidable, if said misrepresentations had been made by him directly, is it voidable because made by agents of his, in whom the appellants had unlimited confidence? It is not alleged that he knew that they had unlimited confidence in said agents. The most that can be claimed, we think, is that the acts and representations of his agents were his acts and representations. We do not think that, by reason of his employment of them, their relations towards the appellants became his relations towards them. If they did not, it is quite clear that the complaint does not show that Hope's relation to the appellants was other than that of a stranger, or that he and they were not dealing at arms' length.

It is alleged that the appellants made said deed without consideration. But it is not alleged that Hope did not pay the full value of this property to the mother of the appellants when he purchased from her, as he and she and all others interested in the property supposed at the time a perfect title to it; and it is not therefore difficult to discover an adequate motive for executing a deed, which should vest in him that which he had purchased for full value, and which was supposed the previous deed had vested in him. Want of consideration is a circumstance which may have more or less weight upon the mind of a court or jury when determining whether a deed has been obtained through fraud. But, in a case like this, where an adequate motive for making the deed is apparent, that circumstance does not necessarily militate against the *bona fides* of the transaction.

It is alleged that the deed was not read, or its contents explained to appellants before they executed it. It is not alleged that they expressed any wish to have it read, or to have its contents explained to them, which may be accounted for by the fact that they were then under the impression that their interest in the property had been previously conveyed to Hope, by what they supposed to be a valid guardian's deed, executed by their mother. If they had read the deed which they executed with the greatest care before executing it, or if its contents had been fully and faithfully explained to them, it would not have had the slightest tendency to remove that impression from their minds, and so long as that impression remained undisturbed, it is in the highest degree improbable that they would have deemed it of the slightest importance that the deed purported to convey their interest in property in which they believed that they had no interest, instead of merely confirming and ratifying a sale and conveyance which they believed to be valid.

It is not claimed that the signatures of the appellants were obtained by any trick or artifice, by which they signed a paper different from that which they intended to sign, nor that its contents were falsely stated to them; but they signed under the impression that they were conveying property in which they had no interest, and they have since learned that they had an interest in it, and if they had ascertained that, before they executed the deed, they would not have executed it without consideration. Without other help, they might have read that deed hourly from its date to the present time without ascertaining from it that they had any interest in the property described in it.

The deed was not executed until about a month after

Packard had communicated to the husband and father-in-law of one of the appellants, and to the mother of all of them the desire of Hope to have a deed from them. This afforded ample time for deliberation, and we infer from the statement of the complaint that the opportunity was to some extent improved.

As before remarked, it does not appear that Hope did not pay full value for the appellants' interest in the land when it was supposed that he had made a valid purchase of it at the invalid guardian's sale; nor is it shown that the appellants were not as much benefited by that sale as they would have been by a valid one. It is not alleged that any of the appellants are weak-minded, or that they were at the time of the execution of their said deed suffering under any affliction or embarrassment. Four of them were married women, but their husbands united with them in the execution of the deed.

Aside from the misrepresentations complained of, the equities of the case are not very strongly on the side of the appellants, and as those misrepresentations related solely to the title, and if made as charged, were made by one dealing with them at arms' length, they do not, upon well-established principles, constitute a sufficient ground for the granting of the relief prayed. We, therefore, think that the demurrer to the complaint was properly sustained, on the ground that it does not state facts sufficient to constitute a cause of action.

Whether the action was brought within the time limited by the statute for the commencement of such an action, is a point upon which we express no opinion, although that question was raised by their oral arguments and briefs.

We concur: Ross, J., Morrison, C. J., McKinstry, J., McKee, J.,

We dissent: Thornton, J., Myrick, J.

IN BANK.

[Filed June 14, 1881.]

No. 7501.

ELMS vs. CITY OF LOS ANGELES.

By the COURT:

Upon the authority of *Feliz vs. The City of Los Angeles*, No. 7502, judgment reversed, and the Court below is instructed to enter judgment in favor of defendant upon the findings.

IN BANK.

[Filed June 15, 1881.]

No. 7749.

GURNEE, PETITIONER,

VS.

THE SUPERIOR COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO, RESPONDENT.

CONSTITUTION—ACTIONS CONCERNING REAL ESTATE—SUPERIOR COURT OF SAN FRANCISCO IS SUCCESSOR TO THE LATE FIFTEENTH DISTRICT COURT OF SAN FRANCISCO. Section 5 of Article VI of the Constitution is prospective in its operation, and has no application to an action for the recovery of real property pending at the time of the adoption of the Constitution. The Superior Court of the City and County of San Francisco succeeded to the jurisdiction of the Fifteenth District Court of such city and county:

George A. Nourse, for Petitioner.

MORRISON, C. J., delivered the opinion of the Court.

This is an application for a writ of prohibition, based upon the following facts, as set forth in the petition:

When the present Constitution went into effect, there was pending in the late District Court of the Fifteenth Judicial District, within and for the City and County of San Francisco, a certain action, wherein Joel S. Polack and Mary, his wife, were plaintiffs, and Clinton Gurnee and William S. Chapman were defendants, which said action was brought for the recovery of certain real estate, situated in the County of Sonoma, in the State of California; and by an order of the Superior Court of the City and County of San Francisco, the records, papers, and proceedings in said action have been transferred to the Department of the Superior Court of said city and county, presided over by the Hon. John Hunt. The petition charges that the said Hon. John Hunt "has unjustly and unlawfully, and in excess of the jurisdiction of said court, and against the objection and protest of said defendants, assumed jurisdiction of said civil action, and of the parties thereto, and the subject matter thereof; and that said John Hunt, so as aforesaid a Judge of said Court, while acting as such Judge of said Court, has announced his intention to cause to be entered in said Superior Court a judgment in said civil action for the recovery by the plaintiffs therein, from the defendants therein, of the possession of the real estate hereinbefore mentioned and described (situ-

ated in Sonoma County), and for other relief; and that judgment of said Court will be entered in said action for recovery by said plaintiffs therein, from said defendants therein, of the possession of said real estate, unless a writ of prohibition shall issue from the Supreme Court of the State of California, commanding said Superior Court and the Honorable John Hunt, Judge thereof, that they and each of them absolutely desist and refrain from any further proceedings in said action."

The question, and only question, for our consideration does the petition show that the Superior Court of the County and County of San Francisco has no jurisdiction to try and determine the case mentioned in said petition?

It is claimed, on behalf of the petitioner, that under provisions of the Constitution the Superior Court of Sonoma County has succeeded to the right and power to try the petition, and that that is the Court to which the papers in the case should have been transferred. In support of this view the learned counsel relies upon Section 5, Article VI, and Section 3, Article XXII, of the State Constitution. By the first section above referred to, it is provided that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or a part thereof affected by such action or actions, is situated; and the latter section provides: "All courts now existing, save Justices' and Police Courts, are hereby abolished; and all records, books, papers, and proceedings from such Courts as are abolished by this Constitution, shall be transferred to the first day of January, eighteen hundred and eighty, to the Courts provided for in this Constitution; and the Courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein."

It clearly appears from Section 5, that it was intended that the law should be *prospective* only in its operation. The language is that "all actions * * * shall be commenced in the county, and neither in its language nor in its spirit does it apply to actions already commenced. It is a well settled rule of construction, applicable alike to Constitutions and statutes, that they are to be considered prospective, and not retrospective in their operations, unless a contrary intention clearly appears.

At the time the action in question was brought, the Court in which the complaint was filed, that is to say, the Fifteenth District Court, had jurisdiction of the case, and its jurisdiction

on, or that of its successor, was not ousted or in any manner affected by any provisions contained in the Constitution. When, therefore, the Fifteenth District Court was abolished, and the Superior Court established in its place, that Court succeeded to its business, and had jurisdiction of all cases then pending in the District Court. It was the Superior Court of the City and County of San Francisco that became the successor to all the rights, power, and authority of the former District Court of said city and county, and in no sense did the Superior Court of Sonoma County become such successor.

Entertaining, as we do, these views, it results that the Superior Court of the City and County of San Francisco has jurisdiction in the case, and the application for a writ of prohibition must, therefore, be denied. It is so ordered.

We concur: Myrick, J.; Sharpstein, J.; Ross, J.; McKinsy, J.; Thornton, J.

IN BANK.

[Filed May 27, 1881.]

No. 7162.

BRODRIBB, RESPONDENT, vs. TIBBETS, APPELLANT.

MORTGAGE—FORECLOSURE—NOTE—INSTALLMENT—STIPULATION AS TO FORECLOSURE IN DEFAULT OF PAYMENT OF INTEREST. If neither the note nor mortgage contains a stipulation that in case of default in payment of interest the mortgage may be foreclosed, a foreclosure cannot be had previous to the maturity of the note.

Appeal from Superior Court, San Bernardino County.

Byron Waters, for respondent.

Tibbets, Paris & Allen, for appellant.

By the COURT:

This case arises out of an action to foreclose a mortgage for our monthly installments of interest, amounting to \$70, alleged to be due and unpaid upon a promissory note which has not become due, and the payment of which is secured by the mortgage.

Neither the note nor mortgage contains any agreement for foreclosure of the mortgage on default of the payment of interest. In the absence of such an agreement, the mortgage cannot be foreclosed until the note shall become due.

Brodrigg vs. Tibbets, April session, 1881.)

Judgment reversed.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 6771.

CALLAHAN, APPELLANT, VS. STANLEY, RESPONDENT.

STUBBLE—CUSTOM—CONTRACT—EVIDENCE—LEASE—HARVEST TIME—TECHNICAL WORDS. The lessee of farming land covenanted that the "stubble" should belong to the landlord. In an action by the landlord's assignee to recover damages for having been prevented from grazing his sheep on the land: *Held*, that evidence was admissible to prove that by the custom of the locality of the leased premises the word "stubble" included whatever was left upon the ground after harvest time. Words used in a technical sense are to be interpreted as usually understood by persons in the business to which they relate.

Appeal from Third District Court, Alameda County.

Pringle & Hayne, for appellant.

Curtis H. Lindley, for respondent.

McKEE, J., delivered the opinion of the Court:

This was an action to recover damages for unlawfully preventing the plaintiff from pasturing his sheep upon certain stubble—to wit, the growth of wheat, oats and barley remaining after harvest time upon the cultivated and uncultivated portions of a certain tract of land which the assignor of the plaintiff had leased to the defendant.

It appears that on the twenty-eighth of October, 1876, one Aurrecochea leased to the defendant for the farming season to end October 1, 1877, about 840 acres of land in the County of Alameda. By the terms of the lease the defendant covenanted as follows: "That he will till and cultivate said premises in a good, farmer-like manner; that he will, in due and proper seasons, sow said premises to wheat, oats or barley, or proportions of each, and will harvest the same at his own cost, charges and expense, as soon as the same is suitable for harvesting; that he will, immediately upon harvesting the same, thresh, clean and sack, in good, new, merchantable sacks, all the grain of every description raised on said premises, and, as threshed and sacked, shall be divided in the field and piled separately, one-fourth of which shall be delivered to Aurrecochea as and for the yearly rental; and all the hay thereon raised on land not plowed by the party of the second part shall belong to the party of the first part, and all hay cut on said land that may be plowed and cultivated by the party of the second part shall be divided

the field equally between the parties hereto, to be cut and mowed by the party of the second part. All the stubble on said land to belong exclusively to the party of the first part" the landlord.

Defendant sowed the entire premises in grain, as provided by the lease, but cut only about 200 acres, leaving the remainder uncut because, in consequence of the extreme dryness of the season, the crop was of scanty growth, and, although there was some little grain in it, yet there was not enough to make it worth harvesting; so, instead of cutting he turned in upon it his sheep, and pastured them there during the months of August and September, 1877; and in the month of August, when the plaintiff, to whom Aurrechea had assigned the stubble, drove about 2000 sheep upon the land for pasturage, he drove them away and prevented the plaintiff from using it for that purpose, upon the ground that the uncut grain was not stubble to which the landlord, or the plaintiff as his assignee, was entitled under the lease. And that was the question at issue.

For the purpose of proving that it was, the plaintiff, on the trial of the case, offered to prove that by the custom of the country in the locality of the premises, the word "stubble" used in the agreement included and designated whatever is left on the ground after the harvest time. The defendant objected to any such proof as incompetent, and the Court sustained the objection and refused to allow plaintiff to introduce such proof, to which ruling plaintiff then and there accepted.

We think that was error. It was the duty of the Court to construe the contract in such a way as to render it operative and effectual to carry out the purpose of the parties as expressed in the language and terms which they used. As a general rule, the words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning; but if they are used in a technical sense they should be interpreted as usually understood by persons in the profession or business to which they relate; and if they have a special meaning given to them by usage, that meaning should be followed. (Sections 1644, 1645, C. C.) In such a case evidence explanatory of the words is admissible, not for the purpose of adding to or qualifying or contradicting the contract, but for the purpose of ascertaining it by expounding the language, and so enabling the court to interpret it according to the actual intention of the parties, and the law and usage of the place where it is to be performed. (Sections 1636, 1646, C. C.)

If there was an existing usage among farmers as to the meaning of the word "stubble" when this contract was made, it must be inferred that the contracting parties, being farmers, contracted with reference to it, and that they used the word in the broader meaning which was given to it by that usage, and not in the ordinary or popular sense. Evidence of such usage and meaning was, therefore, admissible to define and explain the peculiar or local meaning of the word as it was used in the contract, and the Court below should have overruled the objection to the offer made by the plaintiff.

Judgment and order reversed, and cause remanded to the Superior Court of Alameda County for a new trial.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed June 6, 1881.]

No. 7562.

W. S. WILLIAMS ET AL., RESPONDENTS,
VS.

ALEXANDER MONTGOMERY, APPELLANT.

PRACTICE—VERDICT—APPEAL—EVIDENCE. If the evidence does not sustain the verdict the case will be reversed. *Held*, in this case that the evidence did not sustain the verdict of the jury.

Appeal from Superior Court of Yolo County.

Ball & Craig, for appellant.

J. W. Armstrong, for respondents.

By the COURT:

This action was brought to recover the sum of five hundred dollars, alleged to have been paid by plaintiffs to and for the use and benefit of defendant, at his special instance and request. Trial by jury, and verdict for \$314.

We have examined the transcript very carefully, and find no evidence therein to sustain the verdict. If the mortgages referred to were in any manner connected with plaintiff's claim, it appears from the evidence that plaintiff's received a quantity of wheat, sufficient in value to pay the indebtedness of the defendant to them. But in no view of the case is there sufficient evidence to sustain the finding of the jury.

Judgment and order reversed.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 10,634.

PEOPLE, RESPONDENT, vs. FLANNAGAN, APPELLANT.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—APPEARANCES—INSTRUCTION—REASONABLE DOUBT. Upon a trial for murder it is error to charge the jury: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear, by a preponderance of the testimony, that the person killed was manifestly endeavoring and intending to commit a felony. A bare trespass upon property does not justify or excuse a homicide." The combination of intent and endeavor to commit a felony by the deceased is not necessary in order to make out a case of justifiable homicide. Either the intent or endeavor is sufficient. The law of self-defense is a law of necessity—real, or apparently real; and a party acting under it may act upon appearances, even though they turn out to have been false. The jury, upon all the circumstances, is to decide whether the appearances were real, or apparently real, and if from all the evidence in the case they find that the circumstances were such as to excite the fears of a reasonable man, and that a defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for the death, although the circumstances might be insufficient to prove, by a preponderance of the evidence, that the aggressor was actually about to commit a felony. The burden of proof is upon the prosecution in a criminal case, and it is error to charge the jury, when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, that they must convict, unless they are satisfied of the truth of the defense. Such an instruction ignores the doctrine of reasonable doubt, which might be raised by the evidence in the case.

Appeal from Superior Court, Butte County.

J. Hamilton and A. F. Jones, for appellant.*Attorney-General Hart*, for respondent.

MCKEE, J., delivered the opinion of the Court:

From a judgment of conviction of murder comes this appeal by the defendant, upon a transcript on appeal which contains only the judgment and charge of the Court.

At the request of the District Attorney the Court below instructed the jury as follows: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property it must be made to appear, by a preponderance of the testimony, that the person killed was manifestly endeavoring and intending to commit a felony. A bare trespass upon property does not justify or excuse a homicide." This instruction, we think, was erroneous.

It is undoubtedly true, as a legal proposition, that human

life cannot be taken to prevent a mere trespass upon property. But it is equally true that every person has a legal right, in defense of his property, to prevent the commission of a felony. For the purposes of defense and prevention every one is entitled to use whatever force may be necessary—even to the extent of taking the life of a felonious aggressor (*People vs. Payne*, 8 Cal. 34), and a homicide committed under such circumstances is justifiable in law. "Homicide," says the Penal Code, "is justifiable when committed by any person in defense of person or property, against one who manifestly intends or endeavors by violence or surprise to commit a felony" (Sub. 2, Sec. 297, Pen. C.) In such a case the justification is not made to depend upon a combination of intent and endeavor to commit a felony, as erroneously stated to the jury. Either an intent or endeavor to execute such a design will be sufficient to justify resistance for prevention, in defense of person or property. The law of self-defense is a law of necessity; and that necessity must be real or apparently real. A party acting under it may act upon appearances; and he will be justifiable in acting upon them, even though they turn out to have been false. Whether they were real or apparently real is for the jury, in a criminal case, to decide upon all the circumstances, out of which the necessity springs. If from all the evidence in the case they should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death, although the circumstances might be insufficient to prove, by a preponderance of the evidence, that the aggressor was actually about to commit a felony. To justify the defendant in this case it was not, therefore, necessary for him to prove by a preponderance of evidence that the deceased was actually about to commit a felony upon him. It was sufficient if such a design was made to appear from all the circumstances attending the killing. The instruction as given was therefore erroneous, not only because it tended to deprive the defendant of the benefit of the doctrine of appearances, but also because it tended to deprive him of the doctrine of reasonable doubt.

In substance the jury were told that unless they found that the justification, upon which the defendant relied, was made to appear by a preponderance of the evidence, they must convict. But the testimony may have fallen short of such proof, and yet have been sufficient in itself, or in connection

with the evidence of the prosecution to create a reasonable doubt of the defendant's guilt, to the benefit of which the defendant was entitled in law. "It is a cardinal rule in criminal prosecutions," says Mr. Justice Rapallo, in *Stokes v. The People* (53 N. Y. 181) "that the burden of proof rests upon the prosecutor, and that if upon the whole evidence, including that of the defense, as well as of the prosecution, the jury entertain a reasonable doubt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner, and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence, whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are satisfied that he has proved his innocence."

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 6860.

DUNN, RESPONDENT, VS. ALTSCHUL, APPELLANT.

STREET WORK — PATENTED MATERIALS — EVIDENCE — CONTRACT — POWER OF BOARD OF SUPERVISORS. The Board of Supervisors have no power to enter into a contract for street work providing that patented materials shall be used in the work. The requirements of a contract for street work cannot be inferred from the use of the material in the performance of the contract: so *held*, that if patented materials were used, it did not follow that the contract required that they should be used. A contract to do street work cannot be varied, contradicted or added to by parol testimony. In this case there is no evidence that the work was required to be of patented materials.

Appeal from Twenty-third District Court, San Francisco.

D. H. Whittemore, for appellant.

J. C. Bates, for respondent.

McKEE, J., delivered the opinion of the Court:

This appeal is from the judgment and the order denying motion for a new trial in an action to recover a street assessment in San Francisco for work ordered by the Board of Supervisors in constructing a brick sewer, with man-hole and cover, in crossing of Broderick and Geary streets, with cesspools, culverts, curbs and sidewalks on angular corners thereof.

It is contended that the work was required to be done of patented materials, and that the Court below erred in not finding as a fact, from the evidence in the case, that work of that character was required.

As appears from the transcript, the only evidence of the alleged fact is that the Superintendent of Public Streets kept in his office, during the year 1877, as sample plans for work which might be ordered, certain castings usable for corners, marked as follows: "Patented December, 1864. George T. Bowen." The Superintendent also testified that "contractors were required and did use them," but he did not know whether they were patented or not. A witness who had examined the work also testified that the iron covers and corner irons of the work performed by the plaintiff under his contract were marked or moulded with the words, "Patented December, 1864. George T. Bowen." This evidence, about which there is no conflict, is claimed to be conclusive that the materials used in the work were patented articles, and it is contended they were required because they were used.

But the requirements of a contract for work ordered by the Board of Supervisors under the street law of the city cannot be inferred from the use of a material in the performance of the contract.

It is conceded, in the case in hand, that the contractor duly performed his contract. The work was, therefore, done in a workmanlike manner, and was approved and accepted by the Superintendent. No fault is found with the performance of the contract, or with the materials used by the contractor. Both were entirely satisfactory, and the only question is whether the articles used, assuming that they were patented articles, were required by anything in the contract itself, or the record of the proceedings of the Board of Supervisors which authorized it. If the materials used were *not* required, the contractor was at liberty to use them or any others in the performance of his contract. The use of them under such circumstances would not avoid his contract or affect the work done under it, if the work itself was other-

se properly done; but if the work was required to be done with patented materials, either by the resolution of intention which authorized it, or by anything in the contract between the plaintiff and the city or in the proceedings of the Board of Supervisors, it would have been unauthorized, and the contract for performing it would have been void and unenforceable against the property owner—not, however, because of the materials used in it, or of any defect in the work, but because the authorities had no jurisdiction to order it done at all, as was held in the Nicholson Pavement cases, 35 Cal. 695, 699. But in those cases the record of the proceedings by which the work was ordered showed on its face that the work was required to be of patented materials, of which one man alone had the monopoly, being the owner of the patent; and as there could be no competition between bidders, it was held that the Board of Supervisors had no jurisdiction, by the street law under which they acted, to let a contract for such work. There is no such record in this case. It does not appear in the resolution of intention or any order of the Board of Supervisors, the specifications or notice of sealed proposals, or in the contract awarded to the plaintiff, that the work was required to be of patented materials.

The verbal statement of the Superintendent of Streets, made after the contract had been awarded and the work performed and accepted, that contractors were required and to use materials like the sample of castings which was kept in his office, does not prove that the work was of a proprietary character. It is not permissible to vary, contract or add to the record of the proceedings of a street improvement by parol testimony, nor can the jurisdiction of the Board of Supervisors to order work done on a street be vested or divested by the verbal statement of an officer. Such a statement does not tend to show that the work was ordered to be done of patented materials.

In the absence from the record of proceedings of any requirement for work of that character, the mere use of any materials by the contractor which were satisfactory to the Superintendent of Streets could not affect the jurisdiction which had attached to order it, nor affect with invalidity the contract under which it was done, and in which the materials were used. If the work was authorized according to law, the use of the materials did not render it invalid; if it was unauthorized, the use of the materials did not make it valid. The use may have been lawful; the presumption is that way; the exclusive right to use the articles may have expired,

and the public been entitled to the use. At all events we cannot presume that the contractor violated law in using the materials in a work which was ordered and performed within a jurisdiction which had attached to order it done.

As the plaintiff duly performed the contract which was ordered and awarded to him in the exercise of a proper jurisdiction, and the defendant failed to make out his defense as alleged in his answer, it follows that the plaintiff was entitled to judgment.

Judgment and order affirmed.

We concur: Ross, J., McKinstry, J.

IN BANK.

[Filed June 15, 1881.]

No. 4707.

HOKE, APPELLANT, VS. PERDUE ET AL., RESPONDENTS.

SWAMP LAND—PUBLIC CORPORATION—LEEVE DISTRICT No. 5—REPAIR OF LEEVES—INJUNCTION. Levee District No. 5, Sutter County, is a public corporation, and its corporate existence cannot be collaterally attacked. Injunction will not lie to stay the repair of a levee within a district on the ground that a portion of the assessable property had been omitted from the assessment list, it not appearing but that there was already collected sufficient money to defray the expenses of the repair. It is no objection to the repair of a levee that it had originally been constructed without the previous adoption of a plan for the protection of the district. The County Surveyor of the County of Sutter is *ex officio* Engineer of the levee districts within the county, and subject to the control of the Board of Supervisors. The mere opinion of a party that a scheme of repairing levees is impracticable affords no reason in law for arresting the work by injunction.

Appeal from Tenth District Court, Sutter County.

Wilbur & Haymond, for appellant.

Belcher & Ray, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff filed his complaint in the late District Court of Sutter County, against defendants, who then constituted the Board of Supervisors of that county, and prayed "that the defendants be forever restrained and enjoined from reconstructing or repairing said levees or any of them, or from in any manner damming up, or obstructing the natural flow of waters into and through the said Butte Creek Slough, and

damming up or obstructing in any manner, the natural channels through which the waters that flow into and upon the district and are drained therefrom." We have given no prayer of the complaint, because it illustrates the object and purpose of the suit. The complaint is very long and comprehensive, containing as it does, something of a history of the Levee District No. 5, in and for the County of Sutter. The first allegation in the complaint which we will consider is that the district was not legally established, for the reason that the petition to the Board of Supervisors was not signed by more than one-half of the land owners within the district, as was required by Section 21 of the Act of March 1868. (See Laws of 1867-8, p. 316.) It was held in *Van vs. Davis*, 51 Cal., 406, that the district organized by the Board of Supervisors under the foregoing statute, became a public corporation, and that the validity of its corporate existence cannot be collaterally attacked or questioned. The complaint also contains an averment that a large quantity of land lying within the district and subject to taxation or assessment, has been voluntarily omitted from the assessment list filed by the Commissioners in the office of the County Clerk of Sutter County. If this were a proceeding to enjoin the collection of the tax, we are not prepared to say that the omission complained of would not constitute good ground for enjoining the collection of the assessment. See *Levee District vs. Huber*, opinion filed February 24, 1891. But, as has already been shown, this is not a proceeding to enjoin the collection of the tax, but is simply intended to stop the reconstruction or repair of the levee; *non est* but there is a sufficient fund already collected to defray the expenses of such reconstruction and repair.

The allegation that the levee was originally constructed without the previous adoption of a plan for the protection of the district, as provided for in Section 10 of the Act, contains no good reason why the levee, after having been constructed, should not be repaired in places where broken or washed away. But we are not to be understood as saying that the adoption of a plan was at any time essential; for Section 3 of the Act provides that "the County Surveyor of the County of Sutter shall be *ex officio* engineer of all such levee districts in the county, and shall make such surveys, plans, and estimates, superintend all works, and shall give general direction for all their construction, subject to the control of said Board of Supervisors.

The only remaining point in this case which we deem it necessary to notice is, that the effect of repairing the levee,

as is claimed by plaintiff, "will be to dam up the waters and increase the same in volume, until said levee will break and permit said waters to flow down to and upon plaintiff's land and destroy the fences and trees thereon." This averment is, and can be, in the very nature of things, a simple expression of opinion on the part of the plaintiff, and cannot be accepted as the statement of a positive existing fact. The intention of the statute, in authorizing the formation of the district, was to adopt a plan and scheme for the protection of the lands within the district from the encroachment of the waters; and the mere opinion of the plaintiff that the scheme is impracticable, affords no reason in law for arresting the work by injunction.

We concur: Myrick, J., Sharpstein, J., Ross, J., McKinstry, J.

I concur in the judgment: McKee, J.

I concur in the judgment: Thornton, J.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 6859.

DINGLEY, RESPONDENT,

VS.

BANK OF VENTURA ET AL., APPELLANTS.

MORTGAGE—DEED—NOTICE—VENDOR'S LIEN. A conveyance of real property containing a clause that the grantor reserves a lien for the unpaid purchase money, is in effect, as to the unpaid money, a mortgage, and the doctrine of vendor's lien has no application. The record of such conveyance is sufficient notice to subsequent parties that the grantor had a mortgage lien on the property. The assignment of a debt secured by mortgage carries with it the security.

Appeal from First District Court, Ventura County.

Brooks & Blackstock, Storke, Thompson, Williams & Williams, for appellants.

Francis, Hall & Hatch and *Bledsoe*, for respondent.

Ross, J., delivered the opinion of the Court:

On the 2d of May, 1874, the defendant Huse was the owner of certain real property which on that day he conveyed by deed to the defendant Williams in consideration of a cash

ment of \$5,000 in gold coin, and the "further sum of \$4,784, to be paid as follows: \$5,000 in gold coin on the 15th of December proximo, and \$4,784 in gold coin on the day of June, 1875, for which last two sums a lien is re-ed to myself (the grantor) upon the premises." The deed also contained this further clause:

And I (the grantor) hereby reserve a lien upon said tract and as security for the payment of the balance of the purchase money at the times hereinbefore specified, in gold of the United States, with interest at the rate of 1 per cent per month from the 15th day of April, 1874, and upon payment of the balance, namely, \$9,784, with the said interest thereon, I (the grantor) bind myself, my heirs, executors, and administrators to execute a full release and quitclaim of the said premises, free from all encumbrances whatever."

The deed was properly acknowledged and was duly recorded in the appropriate county. For the deferred payments the vendee executed his two certain promissory notes to Huse, one for \$4,784 Huse afterwards endorsed and assigned, for valuable consideration, to the plaintiff's intestate. The defendants other than Huse and Williams are the claimants of certain interests in the land, acquired subsequent to the execution and recording of the deed from Huse to Williams; they claim that the assignment by Huse of the note of 1874 operated a waiver of the lien, and, consequently, that the assignment of the debt did not convey with it the security.

If, as seems to be supposed by appellants' counsel, the lien held by Huse as security for the payment of the deferred purchase money was simply a vendor's lien, their position would undoubtedly be correct. But this was not the case. The lien reserved by Huse was something more than a vendor's lien. Vendor's liens are created by the law, and not by the contract of parties. Section 3046 of the Civil Code, which was in force when the transaction in question was had, declares: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." In the case under consideration, the purchase price remaining unpaid was not secured otherwise than by the personal obligation of the parties; for the parties to the deed expressly contracted that the vendor should have a lien for the unpaid purchase price. It was, as not, therefore, a vendor's lien, but rather a lien secured to the vendor by the contract of the parties. It was in effect, though not technically, a mortgage. In "Jones

on Mortgages," Section 229, it is said: "A lien for the purchase money expressly reserved by a vendor in his deed of conveyance, is a lien created by contract, and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded. It is not waived by the taking of other security, as is the case with an ordinary vendor's lien. It is governed by the same rules that a mortgage is. It passes by an assignment of the note secured by it. It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after a foreclosure sale." (See also 1 Herman on the law of Mortgages, Section 212; *Markoe vs. Andras*, 67 Ill. 34; *Moore vs. Lackey*, 53 Miss., 85; *Wright vs. Troutman*, 81 Ill. 376.) There was nothing in any law which prevented the parties from creating this lien by contract. Section 2922 of the Civil Code, relied on by appellants, did not do so. That section declares: "A mortgage can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property." As already said, the lien in question was not technically a mortgage, but it was one in effect.

The section quoted from the Code cannot be held to deprive a Court of equity of the power, in a proper case, of declaring an instrument which is not a mortgage in form, one in effect. In the case under consideration, the same deed that conveyed the title declared the lien. It was in writing, supported by a valuable consideration, acknowledged, and recorded. Notice was thus given to all the world that the title conveyed was encumbered. No one dealing in respect to the property could fail to have notice of the lien. We know of no principle of law, statutory or otherwise, preventing parties from contracting as the parties in this case did, nor do we know of any reason why their contract should not be enforced by the Courts. A Court of equity looks through the form to the substance of the matter before it, and where, as here, it finds a contract in the deed of conveyance securing to the vendor a lien on the land sold for the unpaid purchase price, it treats it as, what it is substantially, a mortgage. Being in effect a mortgage, the assignment of the debt carried the security. (Authorities *supra*, and *Moore vs. Lackey*, 53 Miss. 85.) And the lien being a matter of record, all parties subsequently dealing in regard to the property did so subject to the lien.

Judgment and order affirmed.

We concur: McKee, J.; McKinstry, J.

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Supreme Court of California.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 10,577.

PEOPLE, RESPONDENT, vs. WILLIAMS, APPELLANT.

CRIMINAL LAW—EMBEZZLEMENT—SHARES OF STOCK. Shares of stock are the subject of embezzlement.

Appeal from Superior Court, San Francisco.

Darwin & Murphy, for appellant.

Attorney-General Hart, for respondent.

ROSS, J., delivered the opinion of the Court:

By the information in this case the defendant was charged with the crime of embezzling certain "shares of stock" of certain mining corporations. The principal point made for the defendant, and the only one we deem it necessary to notice is, that "shares of stock" are not the subject of embezzlement.

Embezzlement is defined by the statute to be "the fraudulent appropriation of property by a person to whom it has been entrusted." If therefore shares of stock constitute *property*, they are the subject of embezzlement. And that they do constitute property was determined by us in the case of *Payne vs. Elliott*, 54 Cal. 342, where we said: "It is 'the shares of stock' which constitute the property which belongs to the shareholder. Otherwise the property would be in the certificate; but the certificate is only evidence of the property; and is not the only evidence, for a transfer on the books of the corporation without the issuance of a certificate, vests title in the shareholder; the certificate is, therefore, but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents."

Judgment and order affirmed.

We concur: McKee, J., McKinstry, J.,

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 6862.

NEAL, APPELLANT, vs. MCNEAR, RESPONDENT.

RIGHT OF WAY—EASEMENT—ACT OF CONGRESS QUIETING TITLE TO LAND IN PETALUMA AND SANTA CLARA. Hopper, the grantor of plaintiff, received from one Baxter a conveyance of a portion of a lot in the town of Petaluma, prior to the passage of the Act of Congress of March 1, 1867, quieting title to land in Petaluma and Santa Clara, in which conveyance Baxter reserved a right of way; and such right was, together with the balance of the lot, afterward, and before the passage of the Act of Congress, conveyed by Baxter to defendant: *Held*, that defendant's easement was not destroyed by said Act; that it was intended by the Act to perpetuate and not to destroy existing possessory rights—not only the tangible occupancy, but all rights to the land acquired by virtue of the occupancy, including easements.

Appeal from Twenty-second District Court, Sonoma County.

W. D. Bliss, for appellant.

E. S. Lippitt, for respondent.

Ross, J., delivered the opinion of the Court:

The lands included within the limits of the city of Petaluma were a part of an alleged Mexican grant, the title to which was rejected by the United States tribunals. The lands were thus determined to be public lands of the Government of the United States. That portion thereof known as lot 380, according to the Stratton survey, was, in the year 1865, in the actual and exclusive occupancy of one Baxter, who held it by possessory title only. On the tenth of June of that year, and while so possessed, Baxter executed to one Hopper a deed purporting to convey that portion of said lot (then called lot 4, block A, according to Brewster's map of Petaluma), fronting 80 feet on Main Street, and extending easterly a depth of 180 feet, with a reservation in these words: "Reserving and excepting, nevertheless, a right of way, in common with the party of the second part, over and along the north twenty feet of the premises herein granted, * * * this reservation and exception to continue only, however, during the pleasure of the parties to these presents." This deed was duly recorded, and thereupon Hopper took possession of the lot therein described. On the twenty-sixth of December, 1865, Baxter executed to the defendant, The Petaluma Gas Company, a deed purporting to convey to the company all of the remaining portion of said lot (being the easterly portion), together with "the right of way

over and along a strip of ground twenty feet wide and one hundred and eighty feet long lying on the northerly side of lot 4." Access cannot be had from Main Street to said easterly portion of the lot, except by passing over that portion of it described in the deed to Hopper or over one or both of the contiguous lots, neither of which has ever belonged to either of the parties to this action, or to the grantors of either.

From the tenth day of July, 1866, the defendant gas company has held the exclusive possession of that portion of the lot described in its deed from Baxter.

On the first of March, 1867, Congress passed the following Act:

"An Act to quiet title to land in the towns of Santa Clara and Petaluma, in the State of California.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the right and title of the United States to the land situated within the corporate limits of the towns of Santa Clara and Petaluma, in the State of California, as defined in the Acts of the Legislature of that State incorporating said towns, be and the same are hereby relinquished and granted to the corporate authorities of said towns and their successors in trust, for and with authority to convey so much of said land as is in the *bona fide* occupancy of parties upon the passage of this Act, by themselves or tenants, to such parties; provided, that this grant shall not extend to any reservation of the United States, nor prejudice any valid adverse right or claim, if such exists, to said land, or any part thereof, nor preclude a judicial examination and adjustment thereof."

On the thirtieth of September, 1867, Hopper being in possession under Baxter of that portion of lot 4, block A, described in the deed executed to him by Baxter, received from the trustees of the city of Petaluma a conveyance of said land; and on April 7, 1877, he conveyed the same land to the plaintiff, from which date the plaintiff has been in its exclusive possession.

It is the right of way over the northerly strip of this land which forms the subject of dispute in the present case.

There can be no doubt that such right of way exists in favor of the gas company, unless the Act of Congress and the proceedings had thereunder have destroyed it, for the right was expressly reserved in the deed from Baxter to Hopper, and was afterwards conveyed to the company by Baxter, together with the easterly portion of the lot. The

question therefore is, was this easement destroyed by the Act of Congress and the conveyance from the city in pursuance of it? We agree with the learned Judge who tried the cause in the Court below that the Act "clearly intended to perpetuate, and not to destroy existing possessory rights—not only the tangible occupancy, but all rights the land acquired by virtue of the occupancy, including easements. It operated by way of release, and fed the possessory right in title." As was also justly observed by him: it was by reason of the possession derived from Baxter that the plaintiff's grantor became the *bona fide* occupant of the lot, and so a beneficiary of the Act of Congress. Receiving the benefit, he took *cum onere*.

Judgment affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed June 18, 1881.]

No. 10,505.

THE PEOPLE, RESPONDENT,
VS.
SEPULVEDA, APPELLANT.

CRIMINAL LAW AND PRACTICE—BAD SPELLING—VERDICT—FLIGHT—TESTIMONY IN REBUTTAL—PRESENCE OF DEFENDANT AT THE TRIAL—RECORD ON APPEAL—NEW TRIAL—BILL OF EXCEPTIONS. Bad spelling will not vitiate a verdict. A verdict, "We, the jury, find the defendances guilty as charged in the inditement," sufficiently shows that the jury found the defendants guilty as charged in the indictment. Evidence having been introduced by the prosecution tending to show flight by defendant, the defense having introduced testimony to the effect that defendant voluntarily surrendered himself into custody: *Held*, proper evidence in rebuttal that defendant hid himself in his house, and, upon discovery by the officers, gave himself up. That a defendant was present during the trial of a felony is a matter constituting no part of the record required to be sent up to the appellate Court. The absence of a defendant pending the trial of a felony is ground for new trial, and the objection must be presented to the appellate Court by bill of exceptions to the order denying the new trial.

Appeal from Superior Court of Santa Clara County.

Kennedy & Terry, for appellant.

J. H. Campbell, for respondent.

THORNTON, J., delivered the opinion of the Court:

The defendant above named and one Francisco Salazar were indicted and tried together for grand larceny. They

were convicted, and sentenced to imprisonment in the State Prison for the term of five years.

An objection is taken to the verdict that it is uncertain. The verdict is as follows: "We, the jury, find the *defendants* guilty as charged in the *inditsement*." The objection is without force. The word "defendants" in it was intended as the plural of defendant, and the word "inditsement" was intended for indictment. We are not aware that a verdict is initiated by incorrect spelling.

An exception was reserved to the admission of the testimony of B. F. Branham, who was called in rebuttal. The bill of exceptions shows that the prosecution, in opening the case, offered evidence tending to show flight by defendants on the day after the property mentioned in the indictment was stolen; that the defendants offered evidence to show that Sepulveda voluntarily delivered himself into custody. To rebut this, after the defense had closed the prosecution called Branham and asked him to "state what occurred at the time of the arrest." To this question defendant Sepulveda objected, on the ground that the evidence sought to be elicited thereby was incompetent, irrelevant, and not rebuttal. The Court overruled the objection, and Sepulveda accepted. The witness answered as follows: "Fitzgerald asked me to go with him to arrest Sepulveda, saying that he was at his house, armed, and had two horses. I went. When we got to Sepulveda's house I went around the back porch and entered. When I got in I found Fitzgerald, who had come in the front door, but Sepulveda was not to be seen. After we had looked through the house without success, we noticed a trunk near the foot of the bed, with a coat of female wearing apparel thrown over the trunk and the foot of the bed, so as to conceal the space between the trunk and the bed. Fitzgerald raised these clothes, and there was Sepulveda. He got up, and said that if he had known that it was John Fitzgerald who had come to arrest him he could not have hidden. We arrested him and took him to jail."

The testimony of the witness, in our judgment, tended to show that given on the part of the defense that Sepulveda surrendered himself voluntarily, and it was properly submitted to the jury. The other grounds of the objection to the question are untenable.

It is further argued on behalf of defendant that the conviction should not stand because the record does not show that the defendant was present during the trial. The record presented does not clearly show this fact, but we find noth-

ing in the statutes of this State requiring that such fact shall appear in the record. The Penal Code prescribes that, on appeal to this Court in a criminal action, a copy of the notice of appeal, and of the record, and of all bills of exception, instructions and indorsements thereon shall be filed here. (Section 1246.) The record is defined by Section 1207 of the same Code, which is in these words:

"When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of the prior conviction, if one, and must, within five days, annex together and file the following papers, which will constitute a record of the action:

"1. The indictment, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The charges given or refused, and the indorsements thereon; and—

"4. A copy of the judgment."

If such fact is to appear in any of the papers mentioned in Section 1207, it must be in the minutes of the trial; and what shall appear in these minutes is nowhere prescribed in any statute, save in the first clause of this section. (See also Political Code, Section 4204.)

This matter is, with us, regulated by statute, and we have not been referred to any statute providing that the fact of the presence of the defendant on trial for a felony during the trial shall appear in the record, nor have we been able to find one.

We cannot, therefore, reverse a judgment because such fact does not so appear, though it is provided by law that if the indictment is for a felony, the defendant must be personally present at the trial. (Penal Code, Section 1043.)

The view here taken of this question is sustained by the provision of the Penal Code that the absence of the defendant from the trial for a felony is one of the grounds for a new trial. (Section 1181.) If the motion for a new trial is made on such ground and refused, the matter may be brought to this Court on a bill of exceptions. We see no other mode under our system of bringing it before us. The question is not brought before us in this way; although a motion for a new trial was made, no such ground was alleged or preferred for which it was asked.

We see no error in the record, and the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed June 16, 1881.]

No. 7466.

BANK OF WOODLAND, RESPONDENT,

vs.

HIATT, APPELLANT.

REPRESENTATIONS—RESCISSION OF CONTRACT—KNOWLEDGE—NOTE—DEFENSE—WORTHLESS MINING STOCK. Misrepresentations made by the payee of a note, he knowing them to be untrue, for the purpose of inducing the payor to purchase mining stock of no value, the latter believing the representations to be true, in connection with an offer by the payee, within a reasonable time, to rescind the contract by tendering the stock and demanding his note, constitutes a perfect defense to an action upon the note. A party has a right to rely upon representations as to facts not within his knowledge, and the person making the representations cannot escape responsibility by showing that the party to whom they were made might have ascertained that they were untrue.

Appeal from Superior Court, Yolo County.

Sprague, Ball, Armstrong & Carey and Montgomery, for respondent.

W. B. Treadwell, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The appellant purchased of one Strong 1000 shares of mining stock, and gave him therefor his (appellant's) non-negotiable note for \$800, payable twelve months after date. The note was transferred to the respondent, who brought an action to recover upon it. This appeal is from the judgment. The defense to the action was that the stock was not, at the time of appellant's said purchase, or when this action was commenced, of any value, and that appellant was induced to purchase it by the false and fraudulent representations of Strong. The value of the stock depended entirely upon the condition and character of a certain mine known as the "Excelsior Mine," and the Court found that Strong, for the purpose of inducing appellant to purchase said stock, represented to him, among other things, "that no work was required to be done on said mine, except to put in blasts and blow the ore out and have it milled," which was untrue; and further represented that there was then on the dump of said mine ore of the value of ten thousand dollars, and that one Jones and another had taken ore from said mine to the value of six thousand dollars, which latter two representations were untrue, and the defendant, by reasonable diligence and

inquiry, might have known them to be untrue; and, while the said Strong knew them to be untrue, he did not intend at the time to cheat, wrong, or defraud the defendant, because he, at the same time, believed said mine to be rich, and said stock to be fully worth the price paid therefor.

The Court also found that "the defendant believed that the Excelsior Mine was of immense value, and bought said stock as a speculation, partly upon the representations made by Strong, and partly upon information obtained from others.

"At the time of said transaction, and for some months thereafter, the said Excelsior stock was selling in this vicinity for from seventy-five cents to one dollar per share, and was of that value for the purposes of sale; but the said stock is now of no value whatever, and the said Excelsior Mine is of no value.

"The defendant, on or about the 10th day of December, 1877, discovered that said mining stock was worthless, and that the representations upon which he had relied were untrue; and within a reasonable time thereafter, to wit, on December 20, 1877, tendered the said stock to said Strong, as averred in his answer, and said Strong refused to receive the same, and has ever since refused so to do. The defendant is now ready and willing to surrender said stock, and has tendered and left the same with the Clerk of said Court."

It appears from another finding of the Court that the mine referred to is located in Arizona, and it does not appear that appellant ever inspected or visited it. The Court, however, finds that by reasonable diligence and inquiry he might have known that the representations of Strong were untrue. As to what the Court would consider "reasonable diligence and inquiry" we are wholly left to conjecture.

But as we view the case, that finding is quite immaterial. Strong made misrepresentations, knowing them to be such, for the purpose of inducing the appellant to purchase stock of no value; and the latter believing such representations to be true, purchased the stock and gave the note sued on for it. That, in connection with the offer, within a reasonable time, to rescind the contract, by tendering the stock to Strong and demanding the note from him, constituted a perfect defense to the action upon the note. Appellant had a right to rely upon Strong's representations as to facts that were not within his (appellant's) knowledge, and Strong cannot escape responsibility by showing that appellant might have ascertained that such representations were untrue. It is sufficient that Strong made them, knowing them to be

ue, for the purpose of inducing the appellant to purchase
 thless stock, and that he accomplished his purpose by
 son of appellant's belief and reliance in the truth of them.
 s unnecessary to cite authorities upon this question. The
 ellant was entitled to a judgment in his favor upon the
 ings.

udgment reversed, with directions that a judgment be
 ered in favor of the defendant upon the findings.

ve concur: Myrick, J., Morrison, C. J., Thornton, J.

IN BANK.

[Filed June 17, 1881.]

No. 6283.

PEOPLE EX REL., ETC., APPELLANTS,

VS.

PFISTER ET AL., RESPONDENTS.

TURNPIKE CORPORATIONS—EXTENSION OF TERM UNDER THE CODE—FILING OF
 CERTIFICATE—TOLLS. A turnpike corporation may extend its term of
 corporate existence under the Code. A corporation electing to con-
 tinue its existence under the Code, by filing its certificate of incorpora-
 tion in the office of the Clerk of the county where the original
 articles of incorporation were filed, and the certificate required to be
 filed for the purpose of extending its term in the same office, suffi-
 ciently complies with the statute. A turnpike corporation has a right
 to collect such tolls as the Board of Supervisors may authorize.

Appeal from Twentieth District Court, Santa Clara County.

Archer, for appellants.

Houghton & Reynolds, for respondents.

HARPSTEIN, J., delivered the opinion of the Court:

The complaint states that the defendants "falsely claim-
 and pretending that there exists at the present time and
 existed for more than five years last past, in the State of
 fornia, a valid, legal and subsisting corporation, formed
 organized under and by virtue of the laws, statutes and
 es of the State of California, under the style and name
 The Santa Cruz Gap Turnpike Joint Stock Company,"
 e unlawfully held and exercised, and still do at the time
 ling this complaint, exercise and claim, and hold unlaw-
 y and wrongfully, divers powers, privileges and franchises
 ally pertaining to such corporations when legally organ-
 and existing and held and exercised by officers thereof."
 and it further states that said "company never at any
 e legally existed as a corporation or body politic, and

that if it did ever so exist and was a corporation at any time, its full term of existence expired and it ceased to be a subsisting corporation on the 11th day of November, A. D. 1877." Upon these and other allegations, to which it is unnecessary to refer, the plaintiff demands judgment that the defendants have usurped franchises, etc., and that they be prohibited from the further exercise of said franchise, etc. The defendants in their answer deny all the material allegations of the complaint, and the findings and judgment of the Court are in their favor.

Among other things, the Court found that on the 16th day of November, 1857, the corporation of which the defendants claim to be officers, became duly incorporated. That in November, 1876, said corporation re-incorporated and duly filed its certificate thereof in the office of the Clerk of said County of Santa Clara, and a certified copy in the office of the Secretary of State. Afterwards, in December, 1876, the stockholders of said corporation took the necessary steps to extend their corporate existence for the period of fifty years.

This corporation existed on the 1st day of January, 1873, and was formed under the laws of this State, and therefore might elect to continue its existence under the provisions of the Code. (C. C. Sec. 287.) Having done so, it was after that a Code corporation, and its certificate of incorporation was properly filed in the office of the Clerk of the county where the original articles of incorporation were filed. The certificate which it was required to file for the purpose of extending the term of its corporate existence was filed in the same office. It seems to us that the requirements of the law were complied with in this respect. The denial of the right of the corporation to collect tolls is based in the complaint exclusively upon the ground that no such corporation exists. If it exists it has a right to collect such tolls as the Board of Supervisors may authorize it to collect. Whether it is collecting more than it is authorized to collect is a question which does not arise upon the record before us.

Judgment and order affirmed.

We concur: Thornton, J., Myrick, J., McKinstry, J., Morrison, C. J.

DISSENTING OPINION.

I dissent. Conceding the validity of the proceedings taken by the "Santa Cruz Gap Turnpike Joint Stock Company," under the provisions of the Code, for the purpose of prolonging its existence, the extension of its existence as a corporation did not, in my opinion, carry with it the right to

lect any tolls beyond the period of twenty years from the
e of its original organization—at the expiration of which
period, according to the law applicable to its original organ-
ization, the road in question was to become a free public
highway: Ross, J.

IN BANK.

[Filed June 16, 1881.]

No. 7047.

LAKE V. L. AND W. ASSOCIATION, RESPONDENT,
vs.

SAN G. O. G. ASSOCIATION, APPELLANT.

DESCRIPTION OF DEED—RESERVATION OF WATER—TIBBET'S SPRINGS—PARTITION. A deed of partition was made, containing the following stipulation: "Reserving, however, unto the said parties of the first and second parts the joint right and ownership in and to all the water of the Tibbet Springs, said waters to be developed and taken out at or above the junction of said springs near where the blue granite ledge crops out on the eastern bank, distant about two hundred yards up the stream from a point in the arroyo known as the Devil's Gate." Held, that the reservation did not include a stream of water running on the west side of the arroyo, uniting with the waters running on the east side thereof at a point on the west side of said arroyo some distance below the blue granite ledge.

Appeal from the Seventeenth District Court, Los Angeles county.

Widney and Brunson, for appellant.

Thom & Ross and Glassell & Smith, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

W. and G. being the joint owners of a certain tract of land through which the Arroyo Seco runs, executed a deed of partition on the 18th of December, 1873, which contains the following stipulation:

"Reserving, however, unto the said parties of the first and second parts (said W. and G.) the joint right and ownership in and to all waters of the Tibbet's Springs, so-called, situated upon tract No. 2 (W.'s tract) last above described; said waters to be developed and taken out at a point at or above the junction of said springs near where the blue granite ledge crops out on the eastern bank, distant about two hundred yards up the stream from a point in the arroyo known as the Devil's Gate."

The question which the Court below was called upon to determine was whether this reservation included a stream of

water which runs down on the west side of the arroyo and unites with the waters running on the east side thereof at a point on the west side of said arroyo some distance below said blue granite ledge. The Court found that it did not, and the appellants insist that that finding is not supported by the evidence. There is little or no conflict of evidence as to the location of blue granite ledge, or as to what waters unite near where it crops out on the east bank of the arroyo; and it appears from a map, introduced by the appellants, that the waters in controversy do not unite with the waters running on the east side of said arroyo at a point near where said blue granite ledge crops out on the east bank; but, as before stated, do unite at a point much nearer where said blue granite ledge crops out on the west bank of said arroyo.

Several witnesses testified that two streams did unite on the east side of the arroyo near the blue granite ledge, neither of which is the stream in dispute. It seems to us quite clear that the appellants must be restricted to such waters as unite near where said blue granite ledge crops out on the east bank. And there is sufficient evidence to justify the finding of the Court that the water running on the west side of the arroyo did not unite with the waters running on the east side of it at a point near where the blue granite ledge crops out on the east bank of the arroyo.

Had it been the intention of the parties to reserve all the waters of the arroyo, to be developed and taken out at a point near where the blue granite ledge crops out, it could have been expressed in those very words. The reference to the junction, near the blue granite ledge on the eastern bank, 200 yards above Devil's Gate, would in that view of the matter be surplusage. The junction of the two streams on the east side of the arroyo is, according to the evidence of some of the witnesses, about 200 yards above the Devil's Gate. The junction of all the waters of the arroyo, as before stated, is on the west side and much less than 200 yards above the Devil's Gate, and much nearer where the blue granite ledge crops out on the western bank than to where it crops out on the eastern bank of the arroyo.

We think that this construction satisfies all the calls of the deed, while the one contended for by appellants would discard many of them.

Judgment and order affirmed.

We concur: McKinstry, J.; Morrison, C. J.

I concur in the judgment: Thornton, J.

(Ross, J., being disqualified, took no part in this decision.)

DISSENTING OPINION.

December 18, 1873, Wilson and Griffin owned portions of the Rancho San Pasqual. That day they made a deed of partition of their portions of the rancho, by which Wilson received tract No. 2, and all the waters upon tract No. 2 except the waters of the "Tibbet Springs," so-called, which waters were to remain in joint ownership, as follows:

"Reserving, however, unto the said parties the ownership and to all the waters of the Tibbet Springs, so-called; said waters to be developed and taken out at a point at or above the junction of said springs, near where the blue granite ledge crops out on the eastern bank, distant about two hundred yards up the stream from a point in the arroyo known as the Devil's Gate, said waters to be conducted," etc.

Certain lands were partitioned to Griffin prior to March 10, 1874. Defendant S. G. O. G. Association purchased of Griffin his interest in the land and water rights.

On the 20th March, 1874, Wilson and the S. G. O. G. Association made an agreement in writing referring to the use of the waters of the "Tibbet Springs," providing for a division of the use by time instead of by quantity, and referring to the possible occasion for constructing a submerged dam. In 1875 plaintiff acquired the right of Wilson. B. D. Wilson was President of plaintiff from June, 1875, to 1878. The trial occurred September, 1879.

The only question between the plaintiff and defendant is as to the identity of certain springs, referred to in the deed of partition as the Tibbet Springs; the plaintiff contending that the name Tibbet Springs, as therein used, designates only such springs as are situated on the eastern bank of the Arroyo Seco. On the other hand, the defendants claim that Tibbet Springs include not only the springs on the eastern bank of the arroyo, but also the springs in the bed of the arroyo and on the western bank of the arroyo, where are the springs and waters in controversy.

After hearing the testimony, the Court below found, among other facts, the following:

Situated upon said tract No. 2, there are and were at the execution of the partition deed, certain springs known as the Tibbet Springs, which are and at all times were situated on the easterly bank of the Arroyo Seco; also certain other springs now and for several years prior to the commencement of this action known as the Ivy Springs, on said tract No. 2, on the westerly bank of said arroyo, and in the bed of the arroyo, on the westerly side thereof. At the time of the execution of said partition deed there flowed and still

flows from said springs on the easterly bank of said arroyo, known as the Tibbet Springs, two streams of water which came and still come to a junction near where a blue granite ledge crops out on the eastern bank of the Arroyo Seco, distant a little over two hundred yards up the stream from a point in the arroyo known as the Devil's Gate. The waters of the said Ivy Springs then flowed and still flow down the said arroyo on the westerly side thereof, and did not then, and do not now, form a junction with any waters at or near where the blue granite ledge crops out on the eastern bank of the arroyo, or at any other point on the easterly side of said arroyo. The springs, at the time of the execution of the partition deed, and since, known as the Tibbet Springs, are the springs then and still rising on the east bank of the arroyo, and did not then include and never have included any spring or water rising on the westerly bank of the arroyo, or in the bed of the arroyo on the westerly side thereof.

The question for us to determine is, whether the foregoing findings are sustained by the evidence.

The evidence is in substance as follows:

In 1866, Wilson and Griffin, joint owners, gave the name of Tibbet Springs to all the springs, including those on the east, those in the bed of the arroyo, and those on the west, the name being given from a man named Tibbets who had lived near there. The name Tibbet Springs was intended to include those marked by plaintiff's map as Ivy Springs. When the deed of partition was under negotiation, Griffin had bargained for a conveyance of his interest to T. F. Croft (who was acting in that regard for the defendant association), and Croft, as a part of the negotiation, asked Wilson to point out the Tibbet Springs and indicate what waters were intended to be included under that name. Wilson took Croft upon the ground and pointed out the different groups, those on the east, those in the bed of the arroyo, and those on the west, and said they all constituted the Tibbet Springs, and were included in the agreement to be used in common. The deed of partition was made with that understanding. Subsequently, and while he was the joint owner, Wilson recognized the right of the association to one-half of the water from all the springs, and with his knowledge it constructed a ditch which joined the waters from the western springs with that from the others. There is no evidence that at the time of executing the deed of partition, or before, Wilson understood that the springs were not included with the others under the general name of Tibbet Springs; neither is there

any evidence that at that time the western springs were known as or called the Ivy Springs. One witness speaks of them as having been called Ivy Springs about a year after the partition deed; others say they received the name from a man named Ivy who had a bee ranch near them in 1876, more than two years after the deed; others still, who have known the waters for many years, never heard the name Ivy Springs applied to them until this controversy arose. The Court did not find that at the date of the partition deed the western springs were known by Wilson or any other person as the Ivy Springs; the finding upon that point is, "now, and for several years prior to the commencement of this action, known as the Ivy Springs." The action having been commenced May 14, 1879, at least three years, perhaps four, may have elapsed after the name Ivy Springs began to be applied, and yet at least a year have elapsed after the deed before the use of the name.

By the terms of the partition deed, "said waters to be developed and taken out at or above the junction of said springs near where the blue granite ledge crops out on the eastern bank, distant about two hundred yards up the stream from a point in the arroyo known as the Devil's Gate."

Testimony offered by plaintiff is to the effect that the waters from the western springs do not join the waters from the eastern springs except at a point *below* the blue granite ledge, and plaintiff claims that therefore the calls of the deed are certain and cannot be varied by parol evidence to show that Wilson intended any other than as specified in the deed. The testimony offered by defendant, however, is that in 1873 and 1874 the waters from all the springs joined *above* the blue granite ledge, the old channels being still visible, and that since then floods have changed the channels so that the joining is below the blue granite ledge. It was therefore competent to prove by parol that Wilson intended to embrace all the springs under the general name of Tibbet Springs.

There is no conflict in the evidence that Wilson understood that the name Tibbet Springs included all the springs from the east to the west bank of the arroyo; that he intended to and did vest in the defendant's grantor a right to the use of one-half of the waters of all the springs, and that the name Ivy Springs was not known at the date of the transaction. The finding of the Court that the Tibbet Springs included only the springs on the eastern bank of the arroyo is not supported by the evidence, and we think that the judgment should therefore be reversed: Myrick, J., McKee, J.

IN BANK.

[Filed June 17, 1881.]

No. 10,584.

PEOPLE, RESPONDENT,
VS.

CHUNG AH CHUE, APPELLANT.

CRIMINAL LAW—REPORTER'S NOTES—WITNESSES—DEFENDANT ENTITLED TO BE CONFRONTED WITH WITNESSES. The reporter's notes of testimony given by a witness upon the trial of a former indictment against the defendant for the same offense—which indictment had been subsequently set aside—the witness being without the State, are not admissible against the defendant on the trial of a second indictment for the same offense. A defendant in a criminal case is entitled to be confronted with the witnesses against him, in the presence of the Court in which the action is being tried, except in the instances specified in Section 686 of the Penal Code.

Appeal from Superior Court, San Francisco.

N. S. Wirt, for appellant.*Attorney-General Hart*, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Indictment for larceny. The defendant had previously been indicted for the larceny of the same property, tried, found guilty, a new trial granted, and the indictment dismissed. On the trial of the present indictment the prosecution was permitted to introduce, against the objections of defendant, the reporter's notes of the testimony of Manuel de Arena, a witness at the trial of the first indictment—evidence being given that Arena was without the State.

The Court erred in permitting the reporter's notes to be read in evidence. It is provided by Section 1870 of the Code of Civil Procedure (subdivision 8) that, at a trial, may be given in evidence "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter." The Penal Code—Section 1102—provides: "The rules of evidence in civil actions are applicable also to criminal actions except as otherwise provided in this Code." Section 686 of the Penal Code, under the head "Rights of a defendant in a criminal action," declares: "In a criminal action the defendant is entitled * * * 3. To produce witnesses on his behalf, and to be confronted with the witnesses against him, in the presence of the Court, except that where the charge has been preliminarily examined be-

re a committing magistrate and the testimony taken down question and answer in the presence of the defendant, no has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is able to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon it being satisfactorily shown to the Court that he is dead or insane, cannot with due diligence be found within the State."

There can be little doubt of the meaning of the foregoing statement. The defendant in a criminal action is entitled "to be confronted with the witnesses against him in the presence of the Court"—that is, the Court in which "the action" is being tried—except in the instances specified.

Devine's case (46 Cal. 48) was tried in the District Court before the Codes took effect, and it does not appear that the mention of the Supreme Court was called to any similar provision in the former Criminal Practice Act.

Judgment and order reversed and cause remanded for a new trial.

We concur: Ross, J., Sharpstein, J., Morrison, C. J., Thornhill, J.

IN BANK.

[Filed June 18, 1881.]

No. 7321.

DUNPHY ET AL., PETITIONERS,

VS.

BELDEN, JUDGE, ETC., RESPONDENT.

MANDAMUS—ACTION PENDING—APPEAL—TRIAL. After a judgment against two defendants had, on appeal by one, been reversed as to him and against the defendant as to whom it stood an execution had been issued, quashed, and an appeal taken from the order quashing the writ, plaintiff filed a new complaint against the defendants, to which the latter interposed a plea of the pendency of the first action as a bar, and moved the cause on the calendar for trial, to which plaintiff objected: *Held*, that mandamus would lie to compel the Court below to proceed to the trial of the action in due course.

Mandamus.

M. Delmas, for petitioners.

C. Black, for respondent.

By the COURT:

The case was submitted on a stipulation that the statement of facts set forth in the answer is true. From this it appears that an action was commenced in the Eighteenth Judicial District Court of Santa Clara County, by Edith Nichols against William Dunphy and Carmen Dunphy, on the trial of which a verdict was found against both defendants for the sum of five thousand dollars, and judgment was rendered thereon; that on the appeal, by William Dunphy alone, the judgment of the District Court was reversed; that after remittitur was filed the plaintiff caused an execution to be issued out of the District Court against the property of the defendant Carmen Dunphy, and caused the same to be levied upon the separate property of the said Carmen. which execution was afterwards, on motion of the said Carmen Dunphy, quashed by the Superior Court of Santa Clara County, the successor of said District Court; that the plaintiff in the action aforesaid duly appealed from the order quashing the execution, which appeal is yet undetermined; that afterwards the said Edith Nichols filed "a new complaint" against the said William Dunphy and Carmen Dunphy; that on the 10th day of May, 1880, the defendants named in said new complaint filed their answer thereto and pleaded "the pendency of the first action herein described as a bar to the second complaint," and moved "said cause" on the calendar against the objection of the plaintiff.

Had the answer, herein, shown that the "second complaint" was an amended complaint in the original action, we would have been called on to decide whether the Court below was authorized, in the exercise of a wise discretion, to await the determination by this Court of an appeal from an order made in the same action which would or might settle the material questions to be decided at the final hearing in the Superior Court. But, as the case is now presented here, it appears that the issues awaiting trial in the Court below have been formed in a new and independent action to the complaint in which a plea of the pendency of another action has been interposed. It will be observed that it is no part of our duty now to decide whether or not the plea is maintainable. In *Avery vs. The Superior Court of the County of Contra Costa* (February 24, 1881), it was held, in effect, that the Superior Court had no power to stay proceedings in an action pending therein until judgment should be rendered in a certain other action in the Circuit Court of the United States. It was indeed there said that the adjudication in the Circuit Court could not affect the rights of the

parties to the action in the Superior Court. But the mandate directing the Superior Court to proceed to a trial of the action did not depend upon the fact that the adjudication of the Circuit Court might or might not be determinative of any question involved in the action in the Superior Court; since, if the latter Court had any discretion in the premises, it did not exceed its jurisdiction by erroneously supposing that the adjudication of the Circuit Court might settle the rights of the parties before it. Mandamus cannot be resorted to for the purpose of controlling the discretion of a Court or officer. *Avery vs. The Superior Court of Contra Costa County* therefore necessarily determined that the Superior Court had no power or discretion to refuse to try the action before it until the conclusion of the action in the Circuit Court of the United States. We can discover no substantial difference between an order staying proceedings in an action until judgment in another action in a United States Court and a like order staying proceedings until judgment in a separate and independent action in another State Court.

Let the writ issue commanding Department No. 1 of the Superior Court of the County of Santa Clara to proceed to the trial of the action in due course.

DISSENTING OPINIONS.

I dissent.* I think that the case of *Avery vs. The Superior Court of Contra Costa County* is entirely different from the case before us. In that case the trial was postponed until a cause pending in a Court of a different jurisdiction, the Circuit Court of the United States for California, was determined. Over this Court last named, and any causes pending in it, the Fifteenth District Court making the order of stay in the cause above referred to, had no control. But in the case before us, the cause, the trial of which is stayed, is in the same Court, and that Court can always control it so as to bring it to trial at any time. To issue the writ on this application would control the discretion vested in the Court by the law. The decision of the question arising on the appeal now in this Court may determine the controversy involved in the action brought in October, 1879. Certainly the Court below is invested with the discretion to postpone the trial of the cause last named until the former appeal is determined in this Court, thus saving expense to the parties. If the party appealing should fail to bring on the hearing on this appeal within a reasonable time, the Court would and should proceed to hear the cause, and no doubt would do so. The

order of the Court below merely postpones the hearing of the cause, but it is in the power of the Court to order a trial at any time, and no doubt it would do so on a showing of facts indicating such a course to be proper.

I think that the writ should be denied and the proceedings dismissed: Thornton, J.

I concur in the dissenting opinion of Mr. Justice Thornton: Morrison, C. J.

DEPARTMENT No. 1.

[Filed June 15, 1881.]

No. 7649.

BLISS, PETITIONER,
VS.

SUPERIOR COURT OF SANTA CLARA COUNTY.

PROHIBITION—INJUNCTION—APPEAL—BOND—STAY OF PROCEEDINGS—OPINION OF THE SUPREME COURT. Prohibition will not live to restrain the lower Court from proceeding in the trial of a cause, pending the determination of an appeal from an order refusing to dissolve a temporary injunction issued in the action. In contemplation of law, an injunction does not injure a party—his rights being secured by the injunction bond. A bond to stay proceedings upon appeal from an order refusing to dissolve an injunction, does not prevent the Court below from proceeding with the trial of the action, as it is only of orders or judgments which command or permit some act to be done, that a stay of proceedings can be had, and, an order refusing to dissolve an injunction is not of that character. It will not be presumed that the lower Court will disregard an opinion of the Supreme Court, rendered in an action pending before such lower Court.

M. Lynch, for petitioner.

Burt, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an application for a writ of prohibition to forbid the Superior Court of Santa Clara County from proceeding further in an action against the petitioner and another defendant, until the determination by this Court of an appeal from an order made by the Court below refusing to dissolve a temporary injunction issued in the action.

The action was brought to have the defendants to it interplead with each other, as to their respective rights to a sum of money, which the plaintiff in the action admitted that they owed to one or other of them. For the purpose of hav-

ing the rights of the defendants to the money adjudged by the Court, they brought the money into Court, and had a temporary injunction issued to restrain the defendants from commencing or prosecuting any suit against them on account of the money. The action was tried and the plaintiff had judgment, but, on appeal, this Court, at the September session, 1880, reversed the judgment. (See *Pfister vs. Wade*, Sept. session, 1880.). When the remittitur was filed in the lower Court, the petitioner, as one of the defendants, moved to dissolve the injunction, which was denied, and he appealed from the order to this Court, where the appeal is now pending.

In contemplation of law the injunction does not injure the petitioner, because his rights to the money in controversy between him and his co-defendant in the action are secured by the injunction bond. (*Merced Company vs. Fremont*, 7 Cal. 130.) Yet it is contended on his behalf, that as he obtained a stay of proceedings by giving an appeal bond of \$1000, on his appeal from the order refusing to dissolve the injunction, the stay, by operation of law, suspends all proceedings in the lower Court until the determination of the appeal, and that the Court below is exceeding its jurisdiction in attempting to try the case. But it is only of orders or judgments which command or permit some act to be done that a stay of proceedings can be had. (*Hicks vs. Michael*, 15 Cal. 109; *Merced Company vs. Fremont*, supra.) The order from which the appeal has been taken is not of that character. Hence the stay of proceedings has not the legal effect of suspending the jurisdiction of the Court over so much of the action as is not affected by the order. A Court has power to proceed upon any matter in an action not affected by the order appealed from. (Sec. 496, C. C. P.)

Although the Court has in this instance denied a motion to dissolve the temporary injunction issued in the action before it, it may, on a final hearing of the case, decide that the plaintiff's were not entitled to it. But if it should ultimately decide otherwise and make the injunction perpetual, the petitioner, as defendant, will be entitled to his motion for a new trial or to an appeal; so he cannot be injured. We cannot suppose that the Court below in its proceedings will disregard the opinion of this Court already rendered in the case. At all events, in the proceedings taken by the Court below in allowing the plaintiffs to file an amended complaint and requiring the defendants to answer it, we see no excess of jurisdiction.

Writ denied.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed June 16, 1881.]

No. 5793.

PEOPLE EX REL. HASTINGS, APPELLANT,
 vs.
 JACKSON ET AL., RESPONDENTS.

LAND LAW—PATENT—STATE NOT INJURED BY PRÉMATURE ISSUANCE OF PATENT—SURVEY—LOCATION—LISTING—PUBLICATION—ACT OF CONGRESS JULY 23, 1866, QUIETING LAND TITLES—INTERVENING RIGHT—POWER OF UNITED STATES OFFICERS. That a patent had been prematurely issued by the State, i. e., before the land had been certified over by the United States, affords no ground for setting it aside at the suit of the State, after the certification, inasmuch as the patentee's location intermediate the survey and certification entitled him to a patent from the State, upon the land being certified over. In such case the State cannot complain that the patent had been prematurely issued. The validity of a certificate of location or patent is not dependent upon the publication of a notice of application by the locator to the Register of the Land Office; for in such case the State is not prejudiced. The Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California," does not apply to valid locations. A valid location made after an invalid one had been made and before the passage of the Act, constitutes an intervening right, which it was not the intention of Congress to interfere with. A location cannot be made on unsurveyed land. After land has been listed to the State by the United States the officers of the latter have no further control over the matter.

Appeal from Seventh District Court, Solano County.

Wells & Lamont, for appellant.

Wheaton & McKenna, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

Thomas, to whose interest the relator has succeeded, attempted in June 1853, to locate a school-land warrant upon the land in controversy. That attempt was made in the manner prescribed by the Legislature, but was ineffectual because the land was then unsurveyed, and not subject to selection. (*Hastings vs. Jackson*, 46 Cal. 234.) On the first of the succeeding October, the land was surveyed by the Government of the United States. On the 24th of December, 1853, "said location was presented to the Register of the United States Land Office of the district wherein the same was located, and was by him duly accepted and approved." This is characterized in *Hastings vs. Jackson*, *supra*, as an unauthorized proceeding, which no law, State or Federal justified. In *Hastings vs. Devlin* (40 Cal. 358), the Court said: "We know

of no statute of California or of the United States authorizing the performance of the acts set forth in the certificate of Gift, Register of the Land Office at Benicia, of December 24, 1853." It was accordingly held in *Hastings vs. Jackson*, *supra*, that the plaintiff in that case, who is the relator in this proceeding, bore no such relations to the property, which was the same in that case as in this, as would entitle him to call in question the title of the defendants, who were the same in that case as in this.

In February, 1857, the defendant Jackson located two school land warrants upon the land and obtained a patent for it from the State in March, 1863. The land was not listed by the United States to this State until February, 1870. In September, 1871, the United States Land Commissioner canceled Jackson's location and sent back to him the warrants which he had located on the land. This was done after the land had been listed to the State, and the Commissioner had no power over the subject after that. (*Hastings vs. Jackson*, *supra*.) It does not appear that anything has transpired since the commencement of the action of *Hastings vs. Jackson*, *supra*, to change the relations which then existed between those parties, or to materially affect their rights in the premises. The grounds upon which the plaintiff in that case claimed relief are those upon which the plaintiff in this case claims relief, and the Court, in that case, passed upon all the questions involved in this, except that it declined to consider whether the State could avoid its conveyance to Jackson because the land was not listed to the State when he obtained the patent for it, or because no notice of his application to locate his warrants upon the land was published as required by law, for the reason that the plaintiff was not in a position to raise those questions.

A point, however, is raised in this case which does not appear to have been before considered, i. e., that the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California," made Thomas' premature location valid. The argument, as we understand it, is that neither the defendant nor the relator had acquired the title to the land prior to the passage of that act, and that the equity of the relator being the older is the stronger.

It must be admitted, we think, that the patent to Jackson was prematurely issued. Section 2 of the Act of April 30, 1857, authorizes the issuance of a patent after the certification of the land located to the State. But we cannot see how the State could avoid the patent on that ground. After the land had been certified over to the State, the locator was en-

titled to a patent upon the presentation of a register's certificate, or other satisfactory evidence that his location had been duly made. A valid location might have been made after the land had been surveyed by the United States, and before the land was certified over to the State. That is, valid in the sense that if after the location was made, the land was certified over to the State, the locator would be entitled to a patent. As between him and the State, his right to the land was fixed by a location upon it in the manner prescribed by the laws of the State. But the title remained in the United States until after the certification of the land over to the State.

Before that event a patent from the State would not convey the title, for the obvious reason that the State had none to convey. Still, upon a valid location, made after the survey, and before the certification, by the United States, the locator was in a position to demand and compel the issuance of a patent whenever the land so located should be certified over to the State. Therefore, if Jackson's location was a valid one, and no patent had been issued to him, he would be entitled to have one issued to him now. We are, therefore, unable to perceive that the State can avoid the patent heretofore issued on the ground that it was prematurely issued.

Aside from the claim that the relator acquired a prior and superior right to that of Jackson to the land, we find but one other objection to the validity of his location, and that is that no notice of application to the Register of the land office for a certificate of location was published as the law required it should be.

The law however does not make the validity of the certificate or patent dependent upon the publication of that notice, which was required to be given in order that adverse claimants might be heard in opposition to the application, if they chose to be. But they were not concluded by the granting of the certificate, with or without notice. The State certainly was in no way prejudiced by the failure to publish such notice; and no one can take advantage of the omission without showing that he was in some way prejudiced by it. This objection was not pressed at the argument, and does not appear to be much relied on, although it is adverted to in one of the briefs.

The point upon which the learned counsel for the relator mainly rely is that the location of Jackson, although made after the survey of the land by the United States, was equally invalid with that of Thomas', which was made before said survey, because both were made before the land had been certified by the United States over to the State, and that

neither would be valid except for the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California."

If Jackson's location was invalid, Thomas undoubtedly has the superior right to the land under that Act. But we are unable to discover that Jackson's location was invalid. It was not made until after the land had been surveyed, and, as we understand the law, a valid selection and location might then be made, and the person making it be entitled to a patent from the State, whenever the land so selected and located should be certified over to the State by the United States. If this view of the law be correct, it necessarily follows that the act of Congress last above referred to cannot be successfully invoked in behalf of the relator. No one will maintain, we think, that that act could be so constructed as to affect a valid location made prior to its passage. It would cure the invalidity of Thomas' location if no intervening right had accrued in the meantime. But a valid location made between the date of Thomas' location and the passage of the act would constitute an intervening right, which it was clearly not the intention of Congress to interfere with.

We think that the demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was properly sustained, and that the judgment should be affirmed.

Judgment affirmed.

We concur: Morrison, J., Thornton J.

DEPARTMENT No. 1.

[Filed June 24, 1881.]

No. 5160.

YOUNG, RESPONDENT, VS. THOMPSON, APPELLANT.

APPEAL WITHOUT MERIT—PRACTICE. A judgment will be affirmed where there is no merit in the appeal.

Appeal from Twenty-second District Court, Sonoma County.

Thomas Presley, for appellant.

Temple & Johnson, for respondent.

By the COURT:

Finding no merit in the appeal the judgment is affirmed.

IN BANK.

[Filed June 16, 1881.]

No. 6519.

DAVID WEISSENBERG ET AL., APPELLANTS,

VS.

B. C. TRUMAN ET AL., RESPONDENTS.

CEMETERY—DEDICATION—DEED—RECITAL—NOTICE—CITY OF LOS ANGELES—TRUSTEES. The city of Los Angeles had power to convey land to trustees for burial purposes. That further interments are not had in the cemetery does not show that the purposes of the trust have been accomplished—it appearing that bodies remain in the cemetery, the protection of which from desecration it is the duty of the trustees to look out for. A recital in the deed that the grantor had formerly dedicated the land for a public cemetery, imparts notice of the fact that the land had been dedicated for that purpose. The city of Los Angeles, by virtue of its charter, possesses the same power over its lands that appertained to it as a pueblo under the Mexican law.

Appeal from the Seventeenth District Court, Los Angeles County.

Glassell, Chapman & Smith, for appellants.

Brunson, Eastman & Graves, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiffs brought this action of ejectment in the District Court of Los Angeles county for the recovery of a certain tract of land situate in the city of Los Angeles. The action was tried by the Court, findings were filed by the Judge, and upon such findings judgment was entered in favor of the defendants. The appeal is on the judgment roll, consisting of the complaint, answer, findings and judgment. The following are the findings in the case:

"This cause was duly tried and submitted to the Court on the sixth day of June, 1878, a jury trial having been regularly waived, and all parties being present by counsel, and the evidence and pleadings and argument having been duly heard and considered, the Court now makes the following findings of fact, viz.:

"1. The lands described in the complaint are a part of the Pueblo lands of the city of Los Angeles, and have been duly patented by the United States Government to the authorities of said city.

"2. In the year 1857 the authorities of said city set apart the lands described in the complaint as a public cemetery,

and in pursuance of said action caused the same to be conveyed by a good and sufficient deed to three trustees, namely, N. A. Potter, J. S. Mallard (the defendant) and Ralph W. Emerson, in trust for the public use and for the purposes of a cemetery, which deed has never been recorded.

"3. Thereafter said tract was used for cemetery purposes, and bodies were interred there until the year 1861, when the City Council resolved to discontinue said cemetery and to remove the bodies already interred there to another place, since which time no further interments have taken place in said grounds. A number of the bodies were removed and some still remain there interred.

"4. On the fourteenth of November, 1870, the city of Los Angeles, for a valuable consideration, made a deed of quit claim to said tract to one T. A. Sanchez, describing the premises in said deed as a 'ten-acre tract of land formerly dedicated by the city of Los Angeles for a public cemetery bounded by the homestead tract of J. S. Mallard and wife, and situated between Pico and Sixth streets; the same being the premises particularly described in the complaint as amended.' That this is the deed that was mentioned in and confirmed by the Act of February 18, 1872 (Laws of 1871-2, page 93), and that plaintiffs have duly succeeded to the title of said Sanchez through mense conveyances before the commencement of this suit; that Isaac Slessinger, now deceased, was, under said Sanchez title, a tenant in common with plaintiffs (except Cohn) and that plaintiff, B. Cohn, is his duly appointed, qualified and acting administrator.

"5. That defendants were, at the commencement of this action, and are now in possession of the premises in controversy, except the defendant Nichols, who is not, and has not been in possession of any part thereof; that defendant Truman holds under defendant Mallard, who conveyed a portion of the premises to the former in the year 1876.

"6. That neither of said defendants have held adverse possession of said premises for more than five years at any time before the commencement of this action.

"7. That plaintiffs were purchasers under Sanchez for a valuable consideration by them paid; and at the time of purchasing and recording their deeds did not have actual notice of the deed formerly made by the city of Los Angeles to the trustees, Potter, Mallard and Emerson; but did know that the premises had been dedicated and used as a cemetery; and they had notice of facts sufficient to put them upon inquiry as to the true state of the title.

"From these findings the conclusion of the Court is, that

the legal title to the premises in controversy is vested in Potter, Mallard and Emerson, and not in the plaintiffs.

"That the effect of the Act of February 13, 1872 (see finding 4), was merely to confirm to Sanchez such title as the city had to convey at the time the deed was made to him; that the city had at the time no title, and therefore conveyed none. And it results that judgment should be entered in favor of defendants, dismissing the action and for costs: and it is so ordered."

It is contended, on behalf of the appellants, that the deed of trust from the City of Los Angeles to Mallard and his associates was *ultra vires*, and therefore void.

By the act to incorporate the city of Los Angeles, passed April 4, 1850, it is provided that "The corporation created by this act shall succeed to all the rights, claims and powers of the Pueblo de Los Angeles, in regard to property, and shall be subject to all the liabilities incurred, and obligations created, by the ayuntamiento of said Pueblo."

That such a conveyance by the Pueblo would have been good, we have no doubt. (*Hart vs. Burnett*, 15 Cal. 542; *Payne and Dewey vs. Treadwell*, 16 Cal. 221; *Scott vs. Dyer et al.* 54 Cal. 430.) And the city of Los Angeles by virtue of the authority conferred upon it by its charter, possessed the same power over its lands that appertained to it as a pueblo under the Mexican law.

Indeed it was eminently fit and proper that a cemetery should be established by the city for the interment of its dead, and that such cemetery should be placed in the possession and under the control of suitable trustees, who were willing to devote the time and trouble necessary to its proper management. We can see no objection to the deed of trust mentioned in the second finding of the Court, and it vested the legal title to the land in the trustees for the purposes of the trust.

It is claimed, however, that the purposes of the trust have been fully accomplished, and that the public use for which the dedication was made and accepted has long since ceased. But the findings do not sustain this conclusion. It is true that the cemetery is no longer used for the interment of the dead, but the findings show that some of the bodies still remain interred therein.

It is the right and duty of the trustees to protect those bodies from unlawful desecration, and it is their right to hold the property in order that that duty may be properly performed.

The next point made is, that plaintiffs had no notice of the

dedication. But is perfectly apparent that the deed from the city, under which plaintiffs claim title, gave them sufficient legal notice of that fact.

Finding four is: That "On the 14th day of November, 1870, the city of Los Angeles, for a valuable consideration, made a deed of quit-claim to said tract to one T. A. Sanchez, describing the premises in said deed as the 'ten-acre tract of land formerly dedicated by the city of Los Angeles for a public cemetery, bounded,' etc. This deed imparted notice of the fact that a dedication of the land had been made by the city, for a specific purpose, and the property had been used for that purpose, as was apparent from the fact that there were graves there at the time Sanchez took his deed. If, therefore, the deed from the city to Mallard and others had been recorded, the notice of the dedication would not have been more complete. We are of the opinion that the deed from the city of Los Angeles to Mallard and his associates, passed the legal title, and, that the trust thereby created is still in force, or was at the time the suit was tried.

It will be time enough for the city or its subsequent grantees, to assert title to the premises, after the bodies now lying in the cemetery have been decorously removed to another resting place, and the purposes of the trust have fully terminated.

Judgment affirmed.

We concur: Ross, J., Myrick, J.

I concur in the judgment: McKinstry, J.

DISSENTING OPINIONS.

I dissent. It is not claimed on behalf of respondents that the sale and conveyance by the City of Los Angeles to the appellants, would not have been valid if the premises had not been previously conveyed to the respondents. The deed under which they claim, according to the findings of the Court, had not been recorded, and the appellants had not actual notice of its existence at the time of their purchase; but they knew that the premises had been dedicated as a cemetery, which is not material unless the mere fact of such dedication rendered a subsequent conveyance by the city void, which is not claimed.

The subsequent finding that the appellants "had notice of facts sufficient to put them upon inquiry as to the true state of the title," is neither a finding of the ultimate fact of notice or of facts from which that fact is legally inferable. It is not found that appellants, having notice of facts sufficient to put

them upon inquiry, did not make and prosecute that inquiry with reasonable diligence and unavailingly. In the absence of such a finding, the finding that they had notice of facts sufficient to put them upon inquiry, is not the equivalent of a finding that they had actual notice of the prior conveyance.

If the plaintiffs had notice sufficient to put them upon inquiry as to the existence of the unrecorded deed, and neglected to make any inquiry or to prosecute it with reasonable diligence, the Court should have found that they had actual notice. Instead of which, it found that they did not have actual notice, which is a direct finding in their favor upon that issue. If the Court likewise found that they did have actual notice, or found facts from which it is necessarily inferable that they did, then the findings upon that question are contradictory, and the judgment should be reversed on that ground.

It is unnecessary to inquire whether the evidence would have justified a finding that the plaintiffs had actual notice of the unrecorded deed. It is not the province of this Court to supply findings of fact. If the findings do not support the judgment it must be reversed without reference to the evidence. The jurisdiction to find a fact from the evidence has not been conferred upon this Court.

But if the finding as to notice was sufficient, would it necessarily affect the plaintiffs' title? The Court found that in the year 1857 the city conveyed the premises to three trustees, one of whom is a defendant herein, "in trust for the public use and for the purpose of a cemetery." And further found that in 1861—twenty years ago—"the City Council resolved to discontinue said cemetery and to remove the bodies already buried there to another place; since such time no further interments have taken place in said grounds. A number of bodies were removed and some still remain there interred."

It may be safely assumed, upon abundant authority, that the city of Los Angeles, with the sanction of the Legislature, could legally discontinue the use of said premises for burial purposes. (*Windt vs. The G. R. Church*, 4 Sandf. Ch., 471; *Brooklyn P. C. vs. Armstrong*, 3 Lansing, 429; *Kincaid's Appeal*, 66 Pa. 411; *Mayor of N. Y. vs. Slack*, 3 Wheeler's Cr. Cases, 237.) The city did discontinue the use of said premises for such purposes, and sold the land to plaintiffs' grantor, and the Legislature confirmed said sale. (Laws of 1871-2, p. 93.) Thereupon the title held by the trustees for a public use reverted to the city. When the public use for which the

trust was created ceased, the trust terminated and the title reverted to the trustor.

It is not now necessary to consider how this might affect those who have friends or relations buried there. They are not before us. But their rights, whatever they may be, cannot be affected by the mere conveyance of the land to the plaintiffs. The rights of survivors are not changed by the mere transfer of title. "The payment of fees and charges to the corporation or its officers, upon interments, gives no title to the land occupied by the body interred. It confers the privilege of sepulture for such body, in the mode used and permitted by the corporation; and the right to have the same remain undisturbed, so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition; and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture." (*Windt vs. G. R. Church*, 4 Sandf. Ch., 474.) This is quoted and approved by Sharswood, J., in *Kincaid's Appeal*, 66 Pa. 411.

If the views above expressed upon either point be correct it follows that the judgment should be reversed: Sharpstein, J., Thornton, J.

When the estate of a *cestui que* has passed to a trustee subject to the trust, the former becomes seized of his first estate upon satisfaction of the trust, and having the right of entry therein, he is entitled to maintain ejectment against the trustee.

The purpose for which the trust was created being satisfied, the trust no longer exists; the trust estate has ended (Section 871, C. C.), and the functions of the trustee have ceased, and although the legal title may remain in him, it is but a barren title, unaccompanied with the right of possession against the person entitled to the estate. He cannot avail himself of it to maintain or defend an action of ejectment between the *cestui que trust* and himself; he holds the title simply for the purpose of reconveying it to the person entitled to the estate. The law makes it his duty to reconvey. (Section 1109, C. C.) A Court of equity, if called upon, will compel him to reconvey, and a Court of law, in an action of ejectment between him and his *cestui que trust*, or the person entitled to the estate, will presume that he has reconveyed.

In *Lade vs. Holford*, Lord Mansfield said that, when trustees ought to convey to the beneficial owner, he would leave it to the jury to presume where such presumption might rea-

sonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form. In *Hopkins vs. Ward*, 6 Munf. 38, it was held that a *cestui que trust*, after the purposes of the deed had been satisfied, may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee; and in *French vs. Edwards*. 21 Wall. 147, it was held that the ejectment would lie to recover the possession of land, where it was held after the use had been determined.

As the trustees were entitled to the possession of the land only for the purpose of the trust, that right ended when the trust ended by the discontinuance of the cemetery. Thereafter their possession could only be continued for their own private purposes, and as those were not founded upon any right or estate paramount to that of their *cestui que trust*, the Court below should have adjudged the plaintiff entitled to the possession, and rendered judgment accordingly. I therefore think the judgment of the Court below should be reversed.

McKee, J.

DEPARTMENT No. 2.

[Filed May 27, 1881.]

No. 7500.

COULTHURST, APPELLANT,

vs.

COULTHURST, RESPONDENT.

PRACTICE—CROSS-COMPLAINT—DIVORCE—PLEADING—RESIDENCE—MARRIAGE.

A cross-complaint, like a complaint, must, in itself, contain all the facts requisite to entitle the defendant to affirmative relief; defects in it cannot be helped by the averments of any other pleading in the action. Marriage and residence within the State for a period of six months, next preceding the commencement of the action, are indispensable facts in a complaint for divorce.

Appeal from Superior Court, Lassen County.

Spencer & McCluskey, for appellant.

H. M. Barstow, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff brought suit against the defendant, in the Superior Court of Lassen County, praying that the bonds of marriage existing between defendant and himself might be

dissolved, and the defendant filed her answer, denying the existence of any of the causes for divorce set forth in the complaint, and also, by way of cross-complaint, averring extreme cruelty on the part of the plaintiff, and praying that the Court might grant her a decree of divorce. The case resulted in a decree granting the defendant's prayer, and from that decree plaintiff prosecutes this appeal.

By Section 442, C. C. P., it is provided that "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action was brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the Court subsequently, a cross-complaint." The defendant, in this case, after denying the charges contained in the complaint, proceeded as follows: "And defendant, as recriminating matter against said plaintiff, and in bar of his cause of divorce, and as a cross-complaint herein alleges: That on or about the month of November, 1872, plaintiff treated defendant with extreme cruelty," etc., proceeding to enumerate the acts of cruelty complained of.

It is claimed on this appeal that the defendant's cross-complaint was totally defective, for the reason that it contained no averment of marriage or residence for the period of six months within the State. It is well settled that both of these facts are necessary and indispensable in a complaint for a divorce, and the only question is, are they equally essential in a cross-complaint? In the case of *Collins vs. Bartlett* (44 Cal. 381), the Court say: "In considering the cross-complaint we have accepted as true all its allegations, but the agreed statement of facts and the finding have not been considered in connection with the cross-complaint, for they cannot be regarded as adding thereto any further fact. The cross-complaint must fall unless it is sustainable on its own allegations of fact." And in the case of *Kreichbaum vs. Melton* (49 Cal. 55), the Court holds that "a cross-complaint must state facts sufficient to entitle the pleader to affirmative relief; and it cannot be helped out by the averments of any of the other pleadings in the action. Like a complaint, it must itself contain all the requisite facts." See, also, *Haskell vs. Haskell* (54 Cal. 262.)

Applying the principles laid down in the above cases to the defendant's cross-complaint, it is very obvious that it was materially defective as a pleading, and did not entitle defendant to the relief granted by the Court.

It is unnecessary to examine the other questions presented

in the transcript, as the material defects in the cross-complaint make it our duty to reverse the judgment.

Judgment reversed.

We concur: Thornton, J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed May 26, 1881.]

No. 7522.

HARTSON, PETITIONER, vs. SHANKLIN, RESPONDENT.

ESTOPPEL—JUDGMENT—CERTIFICATE OF PURCHASE—LANDS—COSTS. Upon application for a writ of mandamus to compel the Surveyor-General of the State to issue a certificate for money paid for land claimed not to have belonged to the State, it appeared that the plaintiff's assignor had been sued and his interest in a certificate of purchase foreclosed, and a judgment rendered for costs: *Held*, that he and his assignees were estopped by the judgment from claiming that the State had no interest in the land; and that the money paid by him was properly applied to the satisfaction of the cost judgment.

J. C. Bates, for petitioner.

Attorney-General Hart, for respondent.

By the COURT:

This is an application for a writ of mandate directing respondent to issue to petitioners a certificate for \$51.10 under Section 3571 of the Political Code. The matters set up in the answer are not denied, and are in substance that the State of California commenced an action against the then holder of the certificate of purchase No. 3394 (being the same mentioned in the petition), in which action judgment was rendered foreclosing the interest of the holder and annulling the certificate, and for \$53.85 costs of said action; on which judgment execution was issued and returned unsatisfied; and thereupon the amount of \$51.10 of the moneys paid on said certificate was applied towards the payment of said judgment. The petitioners claim that the State had no interest in the lands described in the certificate, and therefore the whole amount paid should be returned. It is sufficient to say that the matters substantially involved in this proceeding were necessarily passed upon and adjudicated in the action referred to. Petitioner's assignor had his day in that action; and by permitting his default therein to be entered and judgment rendered without interposing the matters involved herein as a defense, he and his assignees are estopped.

Application denied.

IN BANK.

[Filed June 20, 1881.]

No. 6334.

GEORGE A. SHERMAN, RESPONDENT, •

VS.

JOHN MCCARTHY ET AL., APPELLANTS.

EJECTMENT—COMPLAINT—DESCRIPTION—PATENT—LEGAL TITLE—TRUST—

MORTGAGE—ADMINISTRATOR—NOTICE—EVIDENCE—IDENTITY OF NAME—SHERIFF'S DEED—JUDGMENT—TITLE—TENANTS IN COMMON—SAN PABLO RANCHO. An objection to a complaint in ejectment, that the description of the land contains no starting point, is answered by evidence of the Surveyor that the starting point is certain and definite. A patent under the Act of Congress of March 23, 1851, issued to a party in his individual capacity, he having petitioned the Board of Land Commissioners as administrator, is not void. A patent to a party as administrator vests the legal title in him. One Castro petitioned the Board of Land Commissioners, under the Act of March 23, 1851 (relative to land claims in California), as administrator; the patent was issued to him in his individual capacity, and contained a stipulation that the interests of third persons should not be affected by the patent. *Held*, that the patentee became a trustee for the heirs of the deceased person of whose estate he was administrator, and that his mortgagee was bound to take notice of the rights of such heirs. A mortgage containing the clause, "Meaning to convey all the right, title, interest, claim, and demands and inheritance as heir of the late Francisco M. Castro," simply conveys the interest that the mortgagor had as heir of the deceased. A person executed two instruments, one in the name of "Perre," the other in the name of "Perez." There was evidence that both names represented but one and the same person. *Held*, that the identity of the names being established, the instruments were executed by the same person. A title subsequently acquired by a mortgagor inures to the benefit of his mortgagee. It appearing that a deed had been executed by a person in his official capacity of Sheriff, *held*, valid, though not signed by him as Sheriff. It is error to render judgment in ejectment that plaintiff recover the interest of defendant—the latter being a tenant in common with plaintiff.

Appeal from Fifteenth District Court, County of Contra Costa.

Mills & Jones and Chase, McClure, Dwinelle & Plaisance, for appellants.

B. S. Brooks and Thomas A. Brown, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This is an action of ejectment to recover a portion of what is called the "San Pablo Rancho," and the appeal is taken from the late District Court of Contra Costa County. There are numerous parties defendant, only two of whom, Peter

Magraff and Mary E. May, have appealed, the former from the judgment and order denying a motion for a new trial, and the latter simply from the order denying the motion for a new trial. Numerous errors have been assigned to the proceedings in the District Court, which we will proceed to examine and dispose of.

1. The first objection that we will notice is that the complaint is fatally defective, on the ground that it contains no definite description of the land sued for, as it does not give the starting point. The only evidence on the subject is that of one Taylor, who was called as a witness on behalf of the plaintiff, and testified as follows: "I am a surveyor. [Here insert map.] I made that survey and made that map, and I know the land there shown. The different parties, as shown in the diagram at the margin of the map to have been in possession of the different tracts, were in possession of those tracts at the time I made the survey. The starting point mentioned in the description is certain and definite, and there can be but one such point." We think the complaint sufficient.

2. The next point made on the appeal relates to the legal operation and effect of the patent under which plaintiff claims title. The patent, among other matters, contains the following recitals: "Whereas, it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the Act of Congress, approved the 3d day of March, 1851, entitled 'An Act to ascertain and settle the private land claims in the State of California.'" Joaquin Ysidro Castro, administrator of the estate of Francisco Maria Castro, deceased, as claimant, filed his petition on the 9th day of October, 1852, with the Commissioners, to ascertain and settle the private land claims in the State of California, sitting as a Board in the city of Los Angeles, in which petition he claimed the confirmation of title to a tract of land known by the name of 'San Pablo,' situated in the county of Contra Costa, and State aforesaid, said claim being founded on two Mexican grants to the heirs of Francisco Maria Castro, deceased. * * * And, whereas, the Board of Land Commissioners aforesaid, on the 17th day of April, 1855, rendered a decree of confirmation in favor of the claimant, which decree or decision having been taken by appeal to the District Court of the United States for the Northern District of California, the said District Court, in the case entitled *The United States vs. Joaquin Ysidro Castro*, rendered its decision as follows, to-wit: 'It is by the Court hereby ordered, adjudged

and decreed that the said decision be and the same is hereby affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the said appellee is a good and valid claim, and the same is hereby confirmed to the extent of four square leagues. * * * * *

'Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress aforesaid of the 3d of March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant unto the said Joaquin Y. Castro and to his heirs the tract of land embraced and described in the foregoing survey; but with the stipulation that in virtue of the fifteenth section of the said act, neither the confirmation of this said claim nor this patent shall affect the interests of third persons.

'To have and to hold the said tract of land, with the appurtenances, unto the said Joaquin Y. Castro and to his heirs and assigns forever, with the stipulation aforesaid.'

It is claimed on behalf of the appellant that the above patent is void, but no authority is cited in support of such a view, and we are unable to see any good reason for such a conclusion.

The proceedings before the Board of Land Commissioners show that Joaquin Y. Castro presented his petition before that Board as administrator, and the patent grants the land to him, not in his representative but in his personal capacity; but this does not affect the validity of the instrument. The most that can be contended for is that the patent should have issued to Castro as administrator, and that, therefore, he holds the lands granted as trustee for the heirs of Francisco Maria Castro; but even if the patent had issued to him as such administrator, it would have vested in Joaquin Y. Castro the legal estate with power of disposition, as has been held by this Court.

In the case of *Bonds vs. Hickman*, 29 Cal. 465, the Court says: "We cannot hold the patent void because it was issued to the administrator of the deceased assignee of the warrant, for it is not forbidden by law to be so issued in such cases. It is not shown upon the face of the patent that it was issued for land to which the deceased had the right of pre-emption; and if such was in truth the case, though not recited in the patent, it is not liable to be attacked collaterally on that ground." And in the same case, when again before the Court (32 Cal. 204), the learned Judge delivering the opinion of the Court, says: "The defendant objects that it does not appear that the deed from James Smith to the plaintiff

was made by him as the administrator of Robert Smith, deceased. The patent was to 'James Smith, administrator of Robert Smith, deceased.' The title, which passed by reason of the patent and the proceedings on which it was founded, vested in James Smith, the patentee named. Whether he held it in trust for others we are not informed by the case before us, and we are not aware that it could in any event be a proper subject of inquiry in this action. We are of opinion that the Court erred in excluding the deed from James Smith to the plaintiff, and for that reason the judgment should be reversed and a new trial granted."

The plaintiff in this action derails title through Joaquin Y. Castro; and the legal title was vested in him at the time this action was brought. (*Littlefield vs. Nichols*, 42 Cal. 372.)

The validity, operation and effect of this patent were under consideration, and were passed upon by the Court in the case of *O'Connell vs. Dougherty* (32 Cal. 458), and it was there held that the patent vested the legal estate in Joaquin Y. Castro, under whom plaintiff claims title in this action.

3. Two or three other points are made on this appeal, which we will briefly dispose of:

The identity of "Perre" and "Perez" is sufficiently established, and it appears that the two names represented but one and the same person.

The deed from Nicholas Hunsaker was executed by him as Sheriff, and, although somewhat informal, is substantially good.

4. There is sufficient evidence in the transcript to prove a delivery of the deed from Tewksbury to Sherman, the plaintiff in this action.

5. It was claimed, on behalf of the plaintiff, that the mortgage from Joaquin Y. Castro and wife to Perre, under which the plaintiff's title was derived, was intended to convey, and did convey, the entire Rancho de San Pablo, and that was the construction placed upon the mortgage by the District Court. The language of the instrument is, "That the said parties of the first part for and in consideration of the sum of six thousand dollars, to them in hand paid by the said party of the second part, do grant, bargain, sell and confirm unto said party of the second part, and to his heirs and assigns, all the estate, right, title, interest, claim and demand whatever, as well in law as in equity, of the said parties of the first part, of, in and to all that certain tract or parcel of land lying, being and situate in the county of Contra Costa aforesaid, and more particularly known and described as the Rancho de San Pablo, bordering upon the

Bays of San Francisco and San Pablo, and containing about five leagues, meaning to convey all of the right, title, interest, claim, and demands and inheritance as heirs of the late Francisco M. Castro and his wife, Gabriella Berryessa, deceased."

It appears from the transcript, that Francisco M. Castro departed this life on or about the 5th day of November, 1831, and left surviving him his widow Gabriella and eleven children, of whom the mortgagor was one, and by his last will and testament he devised one-half of the Rancho de San Pablo to his wife, and the remaining half to be divided equally among his children. .

It also appears that Joaquin Y. Castro, on the 9th day of October, 1852, filed his petition before the Board of Land Commissioners, in which he stated that the title of which he asked confirmation, was founded upon two Mexican grants to the heirs of Francisco Maria Castro, and in said petition he represented himself to be the Administrator of the estate of his deceased father, Francisco Maria Castro. It is true that the patent ran to him and his heirs, and therefore vested in him, Joaquin, the legal title, but it is, nevertheless apparent, upon the face of the record, that a trust was vested in him in favor of the heirs of Francisco.

Of all these facts the mortgagee must be deemed to have had notice, actual or implied; for certainly the facts were such as to have put any reasonable person upon inquiry, which inquiry, if properly pursued, would have led to a knowledge of the existing facts. It is very apparent, that Joaquin Y. Castro never did claim any greater interest in the Rancho de San Pablo than the undivided interest which he derived from his father and mother, and we are of the opinion that it was that interest, and that alone, which he intended to mortgage to Perre. The language is: "Meaning to convey all of the right, title, interest, claim and demands and inheritance as heirs of the late Francisco M. Castro and his wife, Gabriella Berryessa." Whatever interest was vested in him and his wife, as the heirs of the deceased father and mother, was conveyed by the mortgage, and it was never intended or contemplated that the entire rancho should be affected by the mortgage lien. The language of the mortgage on all the surrounding circumstances, lead us to this conclusion. The foreclosure and sale, therefore, vested in the purchaser an undivided interest in the rancho, and not the entire property.

6. Appellants, in their briefs, insist that as Joaquin had no title at the time the mortgage was executed, the title sub-

sequently acquired by him did not enure to the benefit of his mortgagee. In support of this proposition authorities are cited to the effect, that a conveyance without covenants of warranty—or, in other words, a deed of release or quit claim—simply passes the title which the grantor has at the time. But that principle has no application to this case, for two reasons: First, the mortgage purports to convey an estate in fee simple; and, secondly, the rule invoked does not apply to mortgages. These questions were fully and ably considered by Chief Justice Field in the case of *Clark vs. Baker*, (14 Cal. 612,) and we accept the language and reasoning of that case, as presenting a correct exposition of the law. (See also *Lent vs. Morrill*, 25 Cal. 500; *The Vallejo Land Association vs. Viera*, 48 Cal. 579.)

The appellants, Mary E. May and Peter Magraff, were grantees of undivided interests in the rancho, deraigning title to such interests from the same common source, and are, therefore, tenants in common with the plaintiff. The judgment against them for their interests was therefore erroneous.

Judgment and order reversed as to Peter Magraff, and as to Mary E. May, the order denying a new trial is reversed.

We concur: Myrick, J., Sharpstein, J., Thornton, J., Ross, J.

DEPARTMENT NO. 1.

[Filed June 28, 1881.]

No. 10,661.

EX PARTE MARSHALL ON HABEAS CORPUS.

BAIL AFTER CONVICTION PENDING APPEAL—CASES AFFIRMED. *Ex parte Marks*, 49 Cal. 681, and *Ex parte Smallman*, 54 Id. 35, affirmed, as to the doctrine that bail will not be allowed after conviction, pending an appeal.

Caleb Dorsey, for petitioner.

By the COURT:

This is an application for bail after conviction. On the authority of *Ex parte Smallman*, 54 Cal. 35, and *Ex parte Marks*, 49 Cal. 681, application denied.

DEPARTMENT No. 2.

[Filed June 22, 1881.]

No. 6868.

VOLL ET AL., APPELLANTS,

VS.

HOLLIS ET AL., RESPONDENTS.

FORCIBLE ENTRY AND DETAINER—DEED—EVIDENCE OF TITLE—TESTIMONY—PRACTICE—APPEAL—ORDER DISMISSING MOTION FOR NEW TRIAL—STATEMENT FILED. In an action of forcible entry or forcible detainer under the Code of Civil Procedure, it is improper to allow in evidence the title deeds of defendant. In such actions title is not in issue, and the question of good faith cuts no figure. The dismissal of a motion for new trial is a denial of the motion. If a statement is on file which is correct, and filed in time, it is improper to dismiss the motion for new trial. An appeal from a judgment cannot be taken more than one year after its entry. It is error to exclude testimony relating to the circumstances of a forcible entry, likewise as to the state of feeling on the part of witness toward the parties.

Appeal from County Court, San Francisco.

Turner & Wade, for appellants.

Jarboe & Harrison, for respondents,

THORNTON, J., delivered the opinion of the Court:

This action is brought to recover possession of a lot in San Francisco. It was brought under the provisions of the Code of Civil Procedure contained in Chapter IV, Part III, of Title III, of that Code. The complaint contains two counts, one for a forcible entry and the other for a forcible detainer. The cause was tried by the Court without a jury, and judgment was rendered for defendants. The plaintiffs moved for a new trial, and on the 3d day of October, 1879, this motion was on motion of defendant's attorney, no one appearing for plaintiffs, dismissed for want of prosecution. An order was entered to that effect. An appeal is prosecuted by the plaintiffs from the judgment and "from the order refusing a new trial."

The judgment was entered on the 20th day of July, 1878, and the appeal from it was taken on the 15th of October, 1879. This appeal from the judgment having been taken more than a year after the same was entered, cannot be considered, and must be dismissed. (C. C. P., Sec. 969.)

It is urged that the motion for a new trial having been dismissed for want of prosecution by the Court below, in the exercise of a proper discretion, the appeal from it should

not be considered. At the time the order was made a statement on this motion was on file, which, according to a stipulation appearing in the transcript, is correct, and was filed in time, and the order should not have been made. (*Warden vs. Mendocino County*, 32 Cal. 655; *Calderwood vs. Peyser*, 42 Id., 120-1.) The order of 3d of October, 1879, dismissing plaintiff's motion must be considered as denying it. Such an order was so construed in *Warden vs. Mendocino County*, *ut supra*, and we shall follow the ruling in that case. The case, then, is properly here on appeal from the order of the 3d of October, 1879, which, in effect, denied the motion for a new trial.

On the argument our attention was called to several points, but we do not consider it necessary to notice all of them.

Evidence was admitted against the objection and exception of plaintiffs that one Hale claimed to be the owner of the land in controversy. The defendants also offered in evidence a deed from E. S. and Lampson Walden to William Hale, dated the 25th day of September, 1875, for the property in controversy, and also a deed from William Hale to defendant Hollis, dated the 31st of July, 1876, for the same property. The plaintiffs objected to the foregoing evidence on the ground that it was immaterial, incompetent and irrelevant. The objection was overruled, and plaintiffs excepted.

We cannot see that there was any ground for the admissibility of the testimony just above stated. Title is not in issue or controversy in this action. (C. C. P., Sec. 1172), And the Court erred in its ruling admitting the testimony. (*McCauley vs. Weller*, 12 Cal. 500; *Mitchell vs. Davis*, 23 Id., 381.)

In *McCauley vs. Weller*, just cited, it was held that "the action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform."

In *Mitchell vs. Davis*, cited above, the Court made use of

the following remarks, which are particularly applicable here: "If the defendant has any title or right of possession to the land, it must be tried in some action proper for trying such questions; but the present is not an action of that kind. He was not justified in attempting to enforce any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then he may be in a situation to litigate, in a proper action, any valid right or title he may have to the land. One great object of the Forcible Entry Act is to prevent even rightful owners from taking the law into their own hands and attempting to recover, by violence, what the remedial process of a Court would give them in a peaceful mode."

This we think is a proper construction of Section 1172, C. C. P., on this subject, which applies alike to an action for a forcible entry or for a forcible detainer, which section is as follows: "On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings."

A forcible entry is defined in Section 1159, C. C. P., and a forcible detainer in Section 1169 of same Code.

The remarks cited above from *McCauley vs. Weller*, and *Mitchell vs. Davis*, apply to both actions. The remedy was intended to prohibit persons from *taking the law into their own hands*, and thus to repress violence. Such a proceeding constitutes a public offense, and it is made a misdemeanor by Section 418 of the Penal Code.

We cannot see that *good faith* constitutes an element in a defense to a forcible entry or a forcible detainer, under the provisions of the Code of Civil Procedure above referred to, nor that an entry made peaceably and in good faith cuts any figure in a defense to a forcible detainer. In either action, the defense is limited as in Section 1172, C. C. P., above cited. The rulings to that effect in the cases referred to by counsel for respondents—*Thompson vs. Smith*, 28 Cal. 532, and *Shelby vs. Houston*, 48 Id., 422—have no application

under the provisions of the Code of Civil Procedure, which were in force when this action was brought and tried.

The decisions of the Courts of New York under a statute substantially similar to the statute of this State are in accord with the views herein expressed. (*Carter vs. Newbold*, 7 How. 166-70; *The People vs. Van Nostrand*, 9 Wend. 50; *Porter vs. The People*, 7 How. 441; *People vs. Fields*, 1 Lans. 222, 223; *People vs. Leonard*, 11 Johns. 504; *Wells vs. De Leyer*, 1 Daly, 39, 46, 2 N. Y. Rev. Stats. 507, Sec. 11. See Taylor's Landlord and Tenant, ch. XVI.)

Mrs. Lotta A. Roberts was called for plaintiffs, who gave testimony as to the forcible entry upon and taking possession of the lots in controversy in August, 1876. On the re-direct examination she was asked as follows: "State if anything occurred with reference to that crowd of people there, with reference to the Mayor's going on the ground and ordering them to stop?"

This inquiry was objected to by the defense as immaterial and irrelevant, and the objection was sustained. To this ruling plaintiffs excepted.

This question should have been allowed. It related to the circumstance of the entry, and was asked to show that it was forcible. The Court erred in excluding it.

C. C. Butler was called as a witness by the defendants. On his cross-examination he was asked: "During that time there was a litigation pending in regard to this property between you and Mr. Voll?" Defendants objected to this question as immaterial, irrelevant and incompetent. Objection sustained, and plaintiffs excepted.

This question was proper. It had reference to the relations between the witness and the plaintiff Voll, and was asked to show a state of feeling by witness toward Voll, as to which the question was allowable. The Court erred in sustaining the objection.

The same is true as to another question also put to the witness, which was excluded on objection of defendants that it was irrelevant and immaterial. The question referred to was as follows: "Was there not a suit brought by yourself in the Twelfth District Court to quiet title, in which you set up this very possession against Mr. Voll?"

We find no other errors in the points discussed; but for the errors above pointed out, the order which denied the motion of defendants for a new trial is reversed, and the cause remanded to the Superior Court of the City and County of San Francisco to be tried anew.

We concur: Sharpstein, J., Myrick, J.

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No. 21.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed June 24, 1880.]

No. 6679.

IN THE MATTER OF THE ESTATE OF H. C. KIBBE, DECEASED.

PROBATE LAW—PLEGDED PROPERTY OF AN ESTATE—SALE—PRESENTATION OF CLAIM—CASH VALUE—NOTE—FINDINGS—TESTIMONY. The Probate Court made an order that stock of an estate "now subject to a lien," etc., should be sold. The stock was sold, the pledge paid, and the balance returned to the Court, and the sale subsequently confirmed by the Court. *Held*, proper. A pledgee is not required to present his claim for allowance if he does not seek recourse against the estate. A sale by an administrator cannot be treated as invalid because, in addition to the full cash value of the property, he receives a note from the purchaser for portion of the price. In the absence of the testimony, the appellate Court will presume that the facts found or necessary to support the action of the Court below were sustained by sufficient evidence.

Appeal from Probate Court of San Francisco.

Belknap, Winans, Belknap & Godoy, for appellant.

W. H. L. Barnes, for respondent.

By the COURT:

1. The testimony has not been brought up, and it must be presumed that the facts found or necessary to support the action of the Probate Court were sustained by sufficient evidence.

2. The order of sale provided for the sale of 24,000 shares of the capital stock of the Europa Mining Company "now subject to a lien of the Merchants' Exchange Bank for about \$4,800." The case shows the stock to have been in the hands of the bank and beyond the reach of the administrator, except upon payment of the amount for which it had been pledged. The sale of the stock—with the consent of the bank—the payment of the sum due to the bank and the balance, was in effect a compliance with the order, and such sale was subsequently confirmed by the Court. The pledgee

would not have been obliged to present the claim unless he sought recourse against other property of the estate than that pledged. (C. C. P. 1500.) The claim of the pledgee has been satisfied out of the pledged property, and the question whether the claim was regularly presented to the Administrator and Probate Judge is, therefore, immaterial.

3. The property was ordered to be sold at "private sale." For a portion of the price of certain stock the administrator took the promissory note of the purchaser. In his return the administrator reported that the sale of the stock was very advantageous to the estate, even although the promissory note should not be paid. The Court in confirming the sale held and determined the sale to be thus advantageous. The sale cannot be treated as invalid because the administrator received a note in addition to the full cash value of the stock.

Order affirmed.

DEPARTMENT No. 1.

[Filed July 1, 1881.]

No. 7640.

SUSANA DE LA OSSA DE HALPIN, APPELLANT,

VS.

GASTON OXARART, RESPONDENT.

FORMER ADJUDICATION. It appearing that the rights of the parties had been fully determined in a former action: *Held*, such adjudication was conclusive in this.

Appeal from Superior Court, Los Angeles County.

H. Allen, for appellant.

Glassell & Smith and *Smith & Brown*, for respondents.

By the COURT:

The rights of the parties herein were fully determined by the judgment in the action brought in the Seventeenth Judicial District Court by Rita Guillen de la Ossa, administratrix of the estate of Vincente de la Ossa, deceased, against the present defendant and others. A simple inspection of the judgment rolls in that action and in this makes the former adjudication of the title clearly apparent.

Judgment and order affirmed.

(Thornton, J., sitting for Ross, J., the latter being disqualified.)

DEPARTMENT No. 2.

[Filed June 22, 1881.]

No. 7521.

RAMSEY, RESPONDENT,

VS.

FLOURNEY ET AL., APPELLANTS.

SWAMP LAND—PREFERRED PURCHASER—CONTEST—WAIVER—PRACTICE—PLEADING—ANSWER—DEMURRER—OBJECTIONS BY DEFENDANT AS TO WHOM DEMURRER HAS BEEN SUSTAINED—Under the Act of April 4, 1870, relating to swamp lands (Statutes 1869-70, p. 878), a party claiming to be a preferred purchaser must show that the land was "occupied for the purpose of tillage or grazing," and that within ninety days after the filing of the plat in the United States Land Office, showing the line of segregation, he has filed an application to have his possessory claim surveyed. The failure to apply for a survey of a claim within ninety days after the filing of the plat, showing the line of segregation in the United States Land Office, is a waiver of any right a party may have had to be a preferred purchaser under said Act. In the case of a contest, referred by the Surveyor-General of State to the Courts, the defendant must show in his answer that he (defendant) is entitled to purchase in preference to plaintiff; a mere denial of plaintiff's right is insufficient. A demurrer will not lie to a pleading containing more counts than one, all of which are not bad. A defendant as to whom a demurrer has been properly sustained, is practically out of the case, and his objections to subsequent proceedings in the action cannot be considered.

Appeal from the Twenty-first District Court, Modoc County.

Spencer & Barnes, for appellant.

J. D. Goodwin, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is a case of conflicting claims to a certain tract of swamp and overflowed land, referred by the Surveyor-General of this State to one of the late District Courts for a final determination. Appellant, Dorris, one of the defendants, filed an answer, which was demurred to, on the ground "that it appears upon the face of said defendant's answer that he is not entitled to purchase any portion of the land claimed by the plaintiff herein." The demurrer was sustained and judgment by default entered against appellant, from which he has appealed.

The demurrer was, doubtless, to the whole answer, and if there be more than one count in it, and all are not bad, the demurrer should have been overruled. As we understand the law, it was necessary for the defendant to show in his answer that he was entitled to purchase the land claimed by

the plaintiff, in order to give him a standing in Court. The mere denial of the plaintiff's right to the land would not, without the allegation of facts showing a right in himself, raise any contest between the defendant and plaintiff. Therefore, we think that appellant's counsel is mistaken in the view which he takes of the denials in the answer. As we interpret the law, those denials alone would constitute no defense in this particular action. An answer containing nothing more might properly be disregarded or stricken out. It would not be sufficient to entitle the defendant interposing it, to a hearing in the case. If not, it would seem to follow that the defendant's denials cannot be treated as constituting an independent count in his answer, and that the demurrer was properly sustained, unless the answer shows that the appellant had a right to purchase the land or some portion of it.

The appellant's right to contest that of respondent to purchase the land in controversy depends upon his (appellant's) right to be deemed a preferred purchaser under the Act of April 4th, 1870. (Stats. 1869-70, p. 878.) That statute recognizes all settlers upon the swamp and overflowed lands belonging to the State, whose settlement is evidenced by actual inclosure, or by ditches, plow-furrows or monuments showing clearly the metes and bounds of their possessory claim, and the same are occupied for purposes of tillage or grazing," as possessing an equitable claim, and entitling them to be deemed preferred purchasers for the period of ninety days after the filing of plats in the United States Land Office of the district in which such land is situated, showing the line of segregation established by authority of the United States. It is alleged in the answer of appellant that this land was surveyed and segregated by authority of the United States in the year 1876. It is not alleged that the land was "occupied for the purposes of tillage or grazing," or that the appellant within ninety days after the filing of said plat showing said line of segregation filed an application to have his possessory claim surveyed.

From which we think it follows: (1) That the answer does not show that the appellant could be deemed a preferred purchaser; (2) that it does not show that his right to be deemed such, if it ever existed, was not waived by his neglect to apply for a survey of his claim within ninety days after the filing of the plat, showing the line of segregation, in the United States Land Office.

If the demurrer was properly sustained the appellant was thereafter practically out of the case; and his objection to

subsequent proceedings cannot be considered, because he was not and could not be in any way affected by them. His right to be heard depended upon the question of his right to purchase, and when it was determined that he had no right to purchase, his right to be heard in the case terminated.

Judgment affirmed.

We concur: Myrick, J., Morrison, C. J., Thornton, J.

DEPARTMENT No. 1.

[Filed June 24, 1881.]

No. 6861.

BRICKELL, RESPONDENT,
VS.

DAVID F. BATCHELDER AND MARIA BAKER
BATCHELDER, APPELLANTS.

MORTGAGE—CONTRACT—INTEREST—FORECLOSURE—CONDITIONS—ACTION—MARRIED WOMAN—CONSIDERATION. Parties may, for a sufficient consideration, change the terms and modify the conditions of a contract. Accordingly, *held*, that the liability of defendants upon a note bearing interest at ten per cent. per year, secured by a mortgage—conceded for the purposes of the argument, to be foreclosable in the default of the payment of interest monthly, was changed by the execution of a second note for an additional sum, secured by a mortgage containing a clause referring to the first mortgage, and providing for a higher rate of interest, substantially following: All arrearages of monthly interest now existing or hereafter to accrue upon that certain note and mortgage (the first note and mortgage), shall bear interest from the date respectively at which they have accrued, or shall accrue, at one per cent. per month, the same to be added monthly to the principal thereof. *Held*, further, that as the second note and mortgage did not provide for a foreclosure in default of payment of interest, but did provide that the interest should be added to the principal, a foreclosure could not be had before the maturity of the note. Since the amendment to Section 167, C. C., a married woman has power to execute a note and mortgage.

Appeal from Twenty-third District Court, San Francisco.

Heydenfeldt, Jr., Neumann, Heydenfeldt and Patterson, for appellants.

Moore & Moore, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action was brought upon several promissory notes made by defendants, and to foreclose mortgages executed by them to secure the payment of the notes.

The first of the notes is recited in the complaint as follows:

"\$36,000.

SAN FRANCISCO, June 1, 1874.

"Five years after date, without grace, for value received, we jointly and severally promise to pay to John Brickell, or his order, the sum of thirty-six thousand dollars in gold coin of the United States, of the standard fineness now established by law, with interest thereon, payable monthly, at the rate of ten per cent per annum in like gold coin until paid. Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate. This note is secured by mortgage of even date herewith.

"DAVID F. BATCHELDER,

"MARIA BAKER BATCHELDER."

The mortgage accompanying the foregoing note contained, amongst others, this stipulation:

"But in case default shall be made in the payment of the said principal sum, or the interest thereon, or any part thereof, according to the terms of said promissory note, or in the performance of any of the covenants hereinafter expressed, then said party of the second part, his heirs, executors, administrators and assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances, in the manner prescribed by law.

"And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars, with interest as aforesaid, together with the costs and charges of such sale, and two per cent upon the said principal and interest for lawyer's fees, which shall become a debt from said party of the first part upon filing the complaint in foreclosure, and the amount of all such other charges as are herein mentioned, and the overplus, if any there be, shall be paid by the party making such sale on demand to the party of the first part, heirs and assigns."

In *Bank of San Luis Obispo vs. Johnson*, 53 Cal. 99, the promissory note was similar to that above recited. It is not necessary to point out the differences between the clause of the mortgage there considered and those hereinafter quoted, nor to decide whether such differences render inapplicable the language employed by the Supreme Court in that case. It might be conceded that inasmuch as the interest upon the principal sum of \$36,000 was by the agreement of these parties made "payable monthly," and so became due each month, the authority to sell in case of default of payment of any part of the interest "according to the terms of said promissory note," and to retain out of the proceeds the principal sum—\$36,000, etc., was in effect and

agreement that the principal should become due, in case of such default. But whatever the original contract between these parties, there can be no doubt of their right, for a sufficient consideration, to change its terms or modify its obligations. The subsequent mortgage, given to secure the note for \$2,000, contains the stipulation.

"It is further agreed and understood that all arrearages of monthly interest now existing, or hereafter to accrue upon that certain note and mortgage made by David F. Batchelder and Maria B. Batchelder to said John Brickell, dated June 1, 1874, (mortgage recorded in Liber 407 of Mortgages at page 180, City and County of San Francisco), shall bear interest from the date respectively at which they have accrued or shall accrue, at one per cent per month, the same to be added monthly to the principal thereof."

There can be no doubt that this clause operated at least a waiver of any right on the part of plaintiff to foreclose the the \$36,000-mortgage, even as to interest by reason of a default in the payment of interest upon the \$36,000, which became due prior to the 20th of February, 1877—the date of the \$2,000-mortgage. This, of itself, is enough to demonstrate that from the date last mentioned the contract of the parties to the prior note and mortgage did not remain in all respects the same—with the single exception that defendants were to pay twelve instead of ten per cent per annum.

The new arrangement as to interest upon the \$36,000-note did not empower the mortgage to sell in default of the payment of any of the monthly interest and to retain out of the proceeds the principal, etc. The payee and mortgagee agreed to wait for his interest until the principal became due by the terms of the note, the payor and mortgagor agreeing to pay one per cent instead of ten-twelfths per cent per month.

It follows, from what has been said, that when this suit was commenced nothing was payable upon the note and mortgage first described in the complaint.

Defendant Maria Baker Batchelder is not alleged to be the wife of the other defendant in the complaint. She is, however, so described in the mortgages annexed. But the prohibition, or incapacity, declared in Section 167 of the Civil Code, was not applicable to the notes and mortgages (other than the one first set forth in the complaint), because they were executed after the amendment which took effect July 1, 1874.

Counsel are requested to prepare a draft decree—in modification of the judgment below—and present the same, on notice, to the presiding Justice.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed June 28, 1881.]

No. 6208.

CROSBY, RESPONDENT, VS. DOWD, APPELLANT.

STATUTE OF LIMITATIONS—DISABILITY—FINDINGS. To enable a party to defeat the plea of the Statute of Limitations, he must show that at the time the action accrued he was not only under one of the disabilities mentioned in the statute, but was at that time entitled to bring the action. When the Statute of Limitations has begun to run, it will continue to run, unaffected by any subsequent disability. The clause of the Statute of Limitations, which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued," does not imply the existence of a person legally competent to enforce it by statute. The statute runs in all cases not expressly excepted from its operation. The Statute of Limitations commences to run upon the issuance of a patent from the United States for lands. At the date of the issuance of a patent, there was a vacancy in the administration of the estate of plaintiff's ancestor; the heir could not then have brought an action to recover the property. *Held*, that the adoption of Section 1452, Code of Civil Procedure, giving heirs a right of action, did not affect the operation of the Statute of Limitations, which had already commenced to run against the heir. If the Court fails to find upon adverse possession, the cause will be reversed for want of a finding on such issue.

Appeal from Twentieth District Court, Santa Clara County.

James H. Birch, for respondent.

Houghton & Reynolds, for appellant.

Ross, J., delivered the opinion of the Court:

The hearing of this cause before the Court in bank affords us the opportunity, of which we gladly avail ourselves, of correcting an error into which we think Department One fell with respect to the question of the Statute of Limitations. The error arose upon the construction put by the Department on Section 328 of the Code of Civil Procedure, which reads as follows:

"If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title first descends or accrues, either—

"1. Within the age or majority; or—

"2. * * * * *

"The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry

or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period."

In our opinion, according to the true construction of this section, in order to entitle one to its protection, he must not only have been a minor when the cause of action accrued, but he must then have been entitled to bring the action. Unless entitled to bring the action, no "disability" could exist; for the disability cannot have reference to a person in whom no right of action exists. (*Meeks vs. Olpherts*, 10 Otto, 568.) This is the construction of the statute adopted by the learned Judge of the United States Circuit Court for California, in the case of *Harris vs. McGovern*, 2 Sawyer's R. 515, and is the construction put upon a similar statute of New York in the cases of *Fleming vs. Griswold*, 3 Hill, 85, and *Becker vs. Von Valkenburg*, 29 Barb. 324. It also accords with the well-established doctrine that when the Statute of Limitations has begun to run, it will continue to run unaffected by any subsequent disability. As held in *Mercer's Lessee vs. Selden*, 1 How. 37, disabilities which bring a party within the exceptions of the statute cannot be piled one upon another, but a party claiming the benefit of the exception can only avail himself of the disability existing when the right of action first accrued. In the present case the cause of action first accrued—assuming the defendants held adverse possession of the premises—on the 19th day of February, 1868—the date of the issuance of the patent under which the plaintiff claims. But at that time the plaintiff, who is one of the heirs of S. J. Crosby, deceased, was not entitled to bring the action. The right of the heir to maintain an action of this character against any one except the executor or administrator, was first given by Section 1452 of the Code of Civil Procedure, which went into effect January 1, 1873. Prior to that time the sole right to maintain an action for the recovery of the real estate of a deceased person, pending administration of the estate, was in the administrator or executor; and notwithstanding a vacancy in the office of executor or administrator, the heir could not maintain such action so long as the administration remained unclosed. (*Chapman vs. Hollister*, 42 Cal. 462.) Nor does the statute which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued," imply the existence of a person legally competent to enforce it by suit. *Tynan vs. Walker*, 35 Cal. 643.)

Therefore, the fact shown by the record that, on the nineteenth of February, 1868, when the cause of action in this case first accrued, and there was a vacancy in the administration of the estate of Crosby, is unimportant. Assuming that there was an adverse possession, the statute commenced to run upon the issuance of the patent against every one not within one of its exceptions. (*Tynan vs. Walker, supra.*)

It is true that the plaintiff was at that time within the age of majority, but she was not then entitled to bring the action, and does not therefore come within the provisions of Section 328 of the Code of Civil Procedure. The fact that the Legislature subsequently conferred upon her the right to maintain the action against any one except the administrator, and that she was then a minor still, could not, for the reasons and under the authorities already mentioned, suspend the statute which (if there was an adverse possession) had already commenced to run against the cause of action. It has often been decided here and elsewhere, that an adverse possession for the statutory period extinguishes the true title and vests title in the adverse holder. (*Langford vs. Poppe*, No. 6008, and cases there cited.) This can only be upon the theory that the statute runs against the title, and consequently against every one (not within one of the exceptions of the statute) whose right is based on that title. Of course, as already intimated, what we have said proceeds upon the assumption that there was an adverse possession of the demanded premises on the part of the defendants. But the Court below did not find whether there was such adverse possession or not; and, as the answer pleads the Statute of Limitations, we must remand the cause for the failure to find on that issue. Inasmuch as, upon another trial, the case may be disposed of on that point, we think it best to withhold the expression of any opinion as to the sufficiency of the description of the decree of foreclosure in the case of *Overfelt vs. Crosby*. It is proper, however, for us to say, in response to a suggestion made in one of the briefs on file, that the Department in holding that resort could not be had to anything *dehors* the record in aid of the description of the decree, did not, of course, intend its language to be understood in the literal sense in which it is said to have been interpreted. The language in this, as in all other cases, should be construed with reference to the facts under consideration. Thus construed, it does not warrant the interpretation which it is said has been placed upon it. But as the opinion of the Department was vacated, nothing further need now be said on the subject.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J., Morrison, C. J., Sharpstein, J.

CONCURRING OPINION.

I concur in the judgment on the ground that there was no finding on the issue raised by the defense of the Statute of Limitations: Thornton, J.

On the ground stated by Mr. Justice Thornton, I concur in the judgment: McKee, J.

IN BANK.

[Filed June 29, 1881.]

No. 7268.

COSNER, APPELLANT,

VS.

BOARD OF SUPERVISORS OF COLUSA COUNTY,
RESPONDENT.

RECLAMATION DISTRICT—SWAMP AND OVERFLOWED LANDS—WARRANT—BOARD OF SUPERVISORS—DISCRETION—MANDAMUS—DISTRICT IN MORE THAN ONE COUNTY. Mandamus will not lie to compel a Board of Supervisors to approve a warrant drawn by the trustees of a reclamation district. Under the provisions of the Political Code relating to the formation of swamp land districts, etc., and providing for the case of a district situated partly in different counties, warrants must be presented to the Board of Supervisors of the several counties in which the land is, and each Board has the same discretion with respect to warrants drawn upon their county as has the Board where the whole district is included within the boundaries of one county.

Appeal from Superior Court of Colusa County.

Adams & Hatch, for appellant.

Hart & Bayne, for respondent.

By the COURT:

This is an action for a writ of mandate commanding the defendant to "approve" warrants drawn by the Trustees of Reclamation District No. 108, in favor of certain persons, whose claims have been allowed by the Trustees, in sums respectively equal to the alleged indebtedness of the district to each of such persons.

District No. 108 is situated partly in Yolo and partly in Colusa county. Section 3446 of the Political Code provides

for the presentation of a petition by the owners of one-half or more of any body of swamped and overflowed lands, susceptible of one mode of reclamation, to the Board of Supervisors "of the county in which the lands, or the greater part thereof, are situated," for the formation of a district.

Section 3448, that when a district is situated partly in different counties the Trustees must, after the petition has been granted (by the Supervisors of the county in which the greater part of the lands are situated), forward a copy of the petition to the Clerk of the Board of Supervisors of each of the other counties in which any part of the district may lie.

Section 3455 requires that the Trustees of the district shall report to the Board of Supervisors of each county—"the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence, repairs, etc."

By Section 3456: "The Board by which the district was formed" (that is, the Board of Supervisors of the county in which the greater part of the lands are situated) are commanded to appoint three "commissioners" to assess all the lands within the district.

Section 3458 provides that the assessment or charge upon each tract of land shall be paid into the Treasury of the county in which the particular tract is situated.

And Section 3465, that a person against whose lands an assessment has been levied must pay to the Treasurer the amount of the charge, in coin, "or in warrants of the district drawn by the Trustees thereof and approved by the Board of Supervisors of the county."

This can only mean the county into the treasury of which the charge is paid.

Section 3456 requires that the money collected upon an assessment shall be paid into the County Treasury as herein-after provided (as in Section 3458), "and paid out for the work of reclamation upon the warrants of the Trustees, approved by the Board of Supervisors of the county."

It would seem clear that the approval is to be by the Supervisors of the county into whose Treasury the money is paid and upon whose Treasurer the particular warrant is drawn by the Trustees.

And Section 3457 provides that the warrants drawn by the Trustees must, after they are approved by the Board of Supervisors (of the county on whose Treasurer they are drawn), be presented to the Treasurer of the county (who has custody of the portion of the assessment collected in such county).

Sections 3467 and 3468 read: "The work necessary for reclamation must be executed under the direction and in the manner prescribed by the Board of Trustees. The Board [of Trustees] must keep accurate accounts of all expenditures, which accounts, and all contracts that may be made by them, are open to the inspection of the Board of Supervisors and every person interested."

A reading of the sections of the Political Code will make it sufficiently manifest that the scheme it furnishes is rendered complicated by the provisions which relate to the collection and disbursements of assessments levied in districts situated in more than one county. If a district could be created only in a single county, and the statute required that the Trustees should report to the Board of Supervisors their plans and estimates; that such Board should appoint commissioners to assess charges, which should be paid into the County Treasury, and which should be paid out for the work upon warrants of the Trustees "approved" by the Supervisors—the warrants being presented to the Treasurer only after they had been so approved; and that the books and accounts, and all contracts made by the Trustees, should be open to the inspection of the Supervisors—it would not be very difficult to arrive at the true interpretation of the provisions of the Code. It would then be apparent that it was intended that the Board of Supervisors should constitute a check upon the Trustees, and that they were vested with general supervisory control over the conduct of the Trustees in the matter of contracts and appropriations of money collected.

The word "approve" is to be considered in connection with the action to which it relates. It does not *ex vi termini* necessarily import the exercise of discretion. Presumptively, however, when the "approval" of a distinct officer is made necessary to validate or consummate the act of another, it is the intention of the Legislature that he should be invested with the option to sanction officially or to disapprove the act submitted to him. It involves the idea of discretion and adjudication. Yet such presumed intention is not conclusive; and if it clearly appears from the nature of the act, or the express language of the context, that the word "approved" is used in a more limited sense, and imposes a mere ministerial or clerical duty, the Courts will so hold. We had little difficulty in deciding that where the power of "approving" an *appraisement* was confided in the Governor, he had a discretion to disapprove it. (*Berryman vs. Perkins*, 55 Cal. 483.) So where a Board of Supervisors were *author-*

ized to contract for a map, it was held that it was intended by the Legislature to refer the propriety of purchasing the map to the local authorities. (*Bowers vs. Sonoma County*, 32 Cal. 68.) If we could believe, after considering the whole scheme for the formation, taxing, and government of the swamp and overflowed land districts, that it was intended that the Board of Supervisors should be bound of course to indorse as "approved" every warrant drawn by the Trustees of a district, we would direct the writ to issue as prayed for. But if, as we have seen, we consider this statute as confined to a district entirely in one county, it seems clear that the Supervisors have had accorded to them a general supervision of the acts of the Trustees, and have imposed upon them a duty to secure just and prudent expenditures of moneys collected as assessments. All persons contracting with the Trustees must be supposed to do so in view of the law, and with full knowledge that any warrant drawn by the Trustees may be disapproved by the Supervisors.

That the Supervisors of each county in which any part of the district is situated may intervene in the management of district affairs, at least to the extent of inspecting all contracts and accounts—that the Trustees may transmit a copy of the petition on which the district was formed to each of such Boards of Supervisors—that they are compelled to report to each their plans for work, and estimates of cost—that the charge upon each separate tract is required to be paid into the treasury of the county where the tract lies—that the money thus deposited in several counties can be paid out only on the warrant of the Trustees, "approved" by the Board of Supervisors of the county on which the particular warrant is drawn—may, and probably does, interfere with the practical working of the scheme. But it is *the* scheme which the statute has designed.

Each Board of Supervisors (when the district extends beyond a single county) has the same discretion with respect to warrants drawn upon their county as has the Board where the whole district is included within the boundaries of one county. The Legislature has seen fit to declare, with reference to these matters, that before any of the money collected as an assessment upon lands in any county shall be paid away, its expenditure shall be approved not only by the Trustees of the land districts, but also by the Supervisors of the county.

Our conclusion is that the Court below properly sustained the demurrer.

Judgment affirmed.

IN BANK.

[Filed June 30, 1881.]

No. 7732.

PEOPLE, APPELLANT, vs. HENRY, RESPONDENT.

ELECTION OF POLICE JUDGE OF SACRAMENTO CITY—CONSTITUTION—MUNICIPAL OFFICER—JUDICIAL ELECTION—JUDICIAL OFFICER. A Police Judge is a judicial officer of a municipality, and not one of the officers mentioned in Section 10, Article XXII, of the Constitution. The Police Judge of Sacramento city is to be elected at the time of the election of other judicial officers. The purpose of the Act of April 1, 1864 (providing for the election of such officer), was, that the Police Judge should be elected at such time; and the present Constitution continuing in existence, Police Courts, and changing the time of holding judicial elections, from the month of October to September, does not alter the effect and meaning of the Act of April 1, 1864, that the Police Judge at Sacramento city should be elected at the election for judicial officers.

Appeal from Superior Court, Sacramento County.

S. S. Holl, for appellant.

Edgerton and Brown, for respondent.

Ross, J., delivered the opinion of the Court:

A Police Judge is undoubtedly a judicial officer, but he is a judicial officer of a municipality. He is, therefore, a municipal officer, and is not one of those mentioned in Section 10, Article XXII, of the present Constitution. (*In re Stuart*, 53 Cal. 748; *Barton vs. Kallach*, opinion filed September 28, 1880; *Uridias vs. Morrill*, 22 Cal. 473; *People vs. Provines*, 34 Cal. 520; Political Code, Sections 4355 and 4370.)

This disposes of the claim of the relator to the office of Police Judge of the city of Sacramento. But the purpose of the action was to oust the respondent as well as to install the relator.

Respondent was elected to the office at the general election held in September, 1879. He was elected by virtue of the act of the Legislature approved April 1, 1864, and of those provisions of the present Constitution continuing in existence Police Courts and changing the time of holding judicial elections from October to the day of the general elections in the month of September.

The act of April 1, 1864, is entitled "An act to provide for the election of the Police Judge of the city of Sacramento at the time of the election of other judicial officers," and declares: "The Police Judge of the city of Sacramento shall be elected at the special judicial election to be holden on the

third Wednesday in October. A. D. 1865, and every two years thereafter, and shall take office on the 1st day of January next succeeding his election, and shall hold for two years and until his successor is elected and qualified."

The evident purpose of this act was, as its title indicates, to provide for the election of the Police Judge of the city of Sacramento at the time of the election of other judicial officers. Until the adoption of the present Constitution such judicial elections were held in the month of October, but by the provisions of that instrument the time of holding them was changed to the day of the general elections in September. Accordingly, at the general election in September, 1879, the judicial officers of the State were elected. At that time the respondent was voted for and elected Police Judge of the city of Sacramento. And although he was not elected on the third Wednesday in October, he was elected at the time of the election of the other judicial officers, which was in accordance with the obvious intent and meaning of the act of April 1, 1864; and having been elected in substantial compliance with the law, and having qualified and entered upon the discharge of the duties of the office, we think his tenure ought not to be disturbed.

Judgment affirmed.

We concur: McKinstry, J., Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed June 24, 1881.]

No. 5283.

SHINN, APPELLANT, vs. YOUNG, RESPONDENT.

FORMER ADJUDICATION--LANDS--CERTIFICATE OF PURCHASE--HOMESTEAD UNDER UNITED STATES LAWS--PATENT--EJECTMENT--ACTION TO QUIET TITLE. In a former action of ejectment between the parties, the validity of a certificate of purchase issued by the State to the defendant in this action, was determined in his favor, as also the validity of a homestead application made by plaintiff herein, under the homestead law of the United States. *Held*, the question of the validity of the State certificate of purchase necessarily involved the validity of the selection of the land by the State, including its listing over to the State by the United States, and that the judgment in that action was conclusive upon the parties in this action to quiet title, notwithstanding plaintiff herein had, since said judgment, obtained a patent from the United States based upon his homestead application.

Appeal from Seventh District Court, Sonoma County.

A. Thomas, for appellant.

Temple & Johnson, for respondent.

Ross, J., delivered the opinion of the Court:

The land in controversy was originally public land of the Government of the United States. The defendant in this action, on the 15th of April, received from the Register of the State Land Office a certificate of purchase for it. On the 18th of December, 1865, the plaintiff in this action made an application to the Register and Receiver of the United States Land Office for the said land, under and by virtue of the United States Homestead Law, and paid those officers the requisite fees, for which they gave him a receipt.

Subsequent to all of those dates, and on the 2d day of May, 1870, Young commenced an action of ejectment in the proper Court against Shinn for the recovery of the said land, basing his right to recover on the certificate of purchase issued to him by the Register of the State Land Office. Shinn resisted the action, and based his right to his land on his homestead claim. After trial had, judgment was rendered for the plaintiff (defendant here), which judgment was, on appeal to this Court, affirmed—the Court saying (48 Cal. 28): "The certificate of purchase gave the plaintiff the right of possession of the premises, unless the proceedings on his part were rendered unavailing by the homestead claim of the defendant; and conceding that the latter proved that he had taken the requisite steps to acquire a homestead, and that it would be valid and entitle him to the possession, except for the proceedings taken by the plaintiff, the question presented is: which party acquired the better right; which party would acquire the title, if each should thereafter proceed in the mode prescribed by law? The party who first commenced his proceedings to acquire the title has the better right. (*Smith vs. Athearn*, 34 Cal. 506.) The plaintiff re-located the land before the defendant filed his homestead claim, and that act secured him the better right to purchase the premises."

The judgment in the ejectment action between these parties determined the validity of the certificate of purchase issued to Young, and the invalidity of the subsequent application by Shinn under the United States homestead law. The validity of the State certificate of purchase necessarily involved the validity of the State selection, including the listing of the land over to the State. All of these proceedings having been put in issue and determined in the action of ejectment between the same parties, is conclusive upon

them in the present action. And it being thus determined, as between these parties, that the United States transferred the land in question to the State of California, it had no title to transfer to Shinn by patent or otherwise.

We concur: McKinsty, J., McKee, J.

IN BANK.

[Filed June 22, 1881.]

No. 7276.

BLACK, APPELLANT, VS. GERICHTEN, RESPONDENT.

MORTGAGE—REDEMPTION—MERGER—JUDGMENT—DEFICIENCY—FORECLOSURE—LIEN. A mortgagee who has foreclosed his mortgage, had the property sold and a judgment docketed for a deficiency is not entitled to redeem the property from one who has redeemed it under a judgment lien from the purchaser at the foreclosure sale. A mortgage is merged in the judgment of foreclosure, and the only lien which the mortgagee has after a sale of the property upon his mortgage, and a docketing of a deficiency judgment is by virtue of such docketed deficiency judgment. (*Frink vs. Murphy*, 21 Cal. 108, distinguished.)

Appeal from Superior Court, San Diego County.

Chase & Luce, for appellant.

Leach & Cleveland, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The only question that arises in this case is whether a party who has foreclosed his mortgage, had the mortgaged premises sold, and docketed a judgment for the deficiency, is entitled to redeem the property so sold from one who has properly redeemed it, under a judgment lien, from the purchaser at the foreclosure sale. Whether such mortgage was foreclosed, in an action in which the mortgagee was plaintiff, or defendant, is immaterial, if in the latter case he filed a cross-complaint and prayed a foreclosure of his mortgage.

It is quite clear that the plaintiff in this case had no mortgage lien on the property subsequent to that on which the property was sold. For it was sold upon his mortgage lien, and his mortgage was merged in the judgment under which it was sold. (*People vs. Beebe*, 1 Barb. 379; *Stackpole vs. Robbins*, 47 Barb. 212; *Davenport vs. Turpin*, 43 Cal. 597.)

And the Code, as we construe it, makes this too clear to admit of argument. After providing that there can be but one action for the enforcement of any right secured by mortgage upon real estate and for the sale of the incumbered property, it provides that if the proceeds of the sale are

insufficient, and a balance remains due, judgment may be docketed for the balance against the defendant personally liable for the debt, "and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may issue." (C. C. P., 726.) Obviously the only lien which a mortgagee has, after the sale of the mortgaged property upon a judgment of foreclosure, of his own mortgage, and the docketing of a judgment for the deficiency, is under and by virtue of the latter judgment. Such a judgment was docketed in favor of the plaintiff herein, and upon that his claim to redeem must rest. And it was distinctly held in *Hershey vs. Dennis*, 53 Cal. 77, that a judgment creditor having a lien by virtue of the docketed deficiency arising from the mortgage sale, was not authorized to redeem from the purchaser at the mortgage sale. And we do not understand counsel for appellant as claiming that he is entitled to redeem under the judgment. They rely however upon *Frink vs. Murphy*, 21 Cal. 108, which would be in point if Kealy, the assignor of Frink, had filed a cross-complaint and prayed a foreclosure of his own mortgage, in the action brought by the holder of the prior mortgage. It nowhere appears in that case that Kealy had a judgment docketed for the deficiency arising from the foreclosure sale, and under the then existing practice he could not have had such a judgment docketed. The only relief which he could obtain in that action was that which he did obtain, viz.: that the surplus arising from sale, if any remained after satisfying the former mortgage, should be applied upon his mortgage. His mortgage was not foreclosed, nor was any judgment for deficiency docketed in his favor. The distinction between that case and this is apparent.

In *Simpson vs. Castle*, 52 Cal. 644, it was held that a judgment docketed for a deficiency, after the sale of the mortgaged premises upon a judgment of foreclosure, is not a lien upon the premises sold if they are purchased by any person other than the mortgage debtor. As we are unable to perceive that the plaintiff herein has any other lien than that created by the docketing of a judgment in his favor for the deficiency arising upon the sale of the premises upon the foreclosure of his own mortgage, the judgment of the Court below must be affirmed.

Judgment affirmed.

We concur: Ross, J., Morrison, C. J., McKee, J., Thornton, J., Myrick, J.

(Mr. Justice McKinstry, not having heard the argument in this case, took no part in the decision.)

them in the present action. As between these parties, that the land in question to the title to transfer to Shinn by

We concur: McKinstry, J.

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BLACK, APPELLA

**MORTGAGE—REDEMPTION
URE—LIEN.** A mort-
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Appeal from

*Chase & Lucie
Leach & Co.*

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in a mining corporation, as they are usually formed in this State, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted?

The mode in which mining companies are formed in this State is familiar to us all.

The owners of the property, or persons expecting to become such, by complying with a few simple formalities, form themselves, with such others as they may take into the association, into a corporation, to which the property is conveyed.

The amount of the capital stock, which is required to be stated in the certificate of incorporation, is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate.

It neither bears, nor is intended nor supposed by the public to bear, the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary. It has recently become the practice to divide the capital stock into 100,000 shares of the value \$100 each, making \$10,000,000 in all, a sum which, it is apparent, can have no reference to any estimate of the real or intrinsic value of what is usually a mere hole in the ground supposed to afford favorable indications.

A striking proof of this is afforded in the present case.

Among the first acts of the corporation was to place (in effect) 5,000 shares of their stock on the market at the price of \$1.00 per share.

The organization having been effected and the property conveyed to the company, the stock is issued to the former owners, to the amount which may have been previously agreed upon. The remainder is reserved for working capital or disposed of in the market for such prices as the value and prospects of the enterprise may justify. The purchaser is, of course, careful to know into how many shares the stock is divided, but he is wholly regardless of the nominal and purely arbitrary par value attributed to the shares.

No subscription paper, mem. of association, deed of settlement, or other document creating either expressly or impliedly any *ex contractu* obligation to take and pay for, at their nominal par value, any shares of stock, is signed by any of the shareholders.

This general account of the mode of organizing mining companies in this State describes with sufficient accuracy what was done in the case at bar.

The requirement of the statutes of this State with regard to mining corporations were strictly complied with.

I am unable to perceive how any *ex contractu* obligation on the part of the shareholders to take and pay for their stock was created. It may be confidently affirmed, that in no case of this description has such an obligation or liability been *intended* to be created.

It has on all hands been supposed that the resources of such corporations were to be derived from the sale of reserved stock, or by levying assessments, with the power of selling delinquent stock.

Creditors are protected by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation.

It was urged on the part of the stockholders' that the shares held by them are to be treated as fully-paid-up stock.

I do not concur in this suggestion.

It might have some plausibility in cases where all the stock has been distributed among the owners of the mine in proportion to their respective interests. But where stock has been reserved, and subsequently sold at perhaps one-hundredth part of its nominal par value it can in no sense be called or treated as fully-paid-up stock.

But even in the case of shares distributed among the mine owners, the view suggested seems to me inadmissible.

It is a pure fiction. The mine owners do not, in fact, agree to take the stock and pay for it at its nominal par value—payment to be made by conveying the mining ground at a valuation extravagantly in excess of its real value.

If they had really contracted any obligation to take and pay for the stock, they could not acquit themselves of it by such a device. (*Sanger vs. Upton*, 91 U. S. 60; 21 Wend. 296; 16 N. Y. 459; 14 Johns. 228; 9 Johns. 217.)

To call the stock fully paid up is to admit the obligation to take and pay for it, and to suppose that obligation to have been fulfilled in a mode the law will not permit. In my view, no such obligation *ex contractu* was at any time created.

If the liability to pay the nominal par value of the stock for the benefit of creditors exists, it must arise from the positive provisions of the statutes, and not from the contracts of the parties.

This question I will now proceed to examine.

The statutory provision by which this liability is supposed to be created is found in the 349th section of the Code of Civil Procedure. The previous sections of the article of the Code contain detailed and minute provisions regulating the levying of assessments; then to the sale of delinquent stock.

Section 349 provides that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the Board of Directors may elect to waive further proceedings under this chapter, for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof."

It is this last clause which is supposed to create a legal liability on the part of the stockholders to pay assessments up to the par

value of the stock, when necessary to satisfy the indebtedness of the corporation.

But to this view there are grave and, in my judgment, insuperable objections.

1. The statute does not in terms declare or create the liability

It merely authorizes the directors "to elect to proceed by action to recover the amount of the assessments."

Its language would be satisfied by restricting its operation to those cases where such an action can be maintained; that is, to those cases where stock has been subscribed for, and an obligation assumed to take and pay for it.

In the case of railroad, telegraph and wagon-road associations, the articles of incorporation are required to state that at least ten per cent. of the capital stock subscribed has been paid in, and no such corporation can be organized until subscriptions to its capital stock have been obtained in a specified amount for each mile of the contemplated work, and ten per cent. of this amount must be paid in before the articles are filed. (§§ 291, 292, 293, 294.)

By Section 290, the articles of incorporation must set forth:

1. * * * * *

6. "The amount of the capital stock, and the number of shares into which it is divided."

7. "If there is a capital stock, the amount actually subscribed, and by whom."

These provisions are retained in the latest amendments to the Code, 1880.

The only meaning I can attach to them is, that the Legislature contemplated two classes of corporations, in both of which the amount of the so-called capital stock and the number of shares into which it is divided, are required to be stated, but in only one of these classes the stock was supposed to be subscribed for, and an obligation incurred to take and pay for it.

This latter class includes, as we have seen, railroad, wagon-road and telegraph companies, and banking, insurance and other associations based on capital paid in or agreed to be paid in.

It is to this class that the clause giving the directors the right to elect "to proceed by action to recover by action the amount of the assessment" must, in my judgment, be deemed to refer.

2d. The argument of the learned counsel for the creditors admitted that the liability contended for was limited to an amount equal to the par value of the stock held by the stockholders, and that it could only be enforced for the benefit of creditors.

But if the construction of Section 349 contended for be sound, I fail to perceive on what grounds this limitation or restriction can be imposed.

Section 331 authorizes the directors of corporations to levy and

collect assessments upon the capital stock for the purpose of paying expenses, conducting business, or paying debts.

The statute nowhere limits the aggregate of assessments that may be levied to the par value of the capital stock, and it has been held by the U. S. Circuit Court for this district that an assessment may be levied upon the full paid shares of a subscriber to stock in a bank, and his shares sold out if the assessment is not paid.

Section 349 confers, as we have seen, the right to proceed by action to recover any delinquent assessment; and if this power be not restricted, as I have suggested, to cases wherein the stockholder has, by express or implied contract, agreed to pay, it will extend to all cases of assessments levied to meet expenses or conduct business, as well as to pay debts, and may be exercised against a stockholder who has paid his subscription in full, or who has already been assessed up to the par value of his stock.

This result, startling and absurd as it is, seems to be the necessary consequence of the construction of § 349 contended for.

3d. It will not be disputed that the ordinary rule which requires such a construction to be given to the provisions of a statute as will make them consistent and harmonious should be applied to the provisions of our Code with regard to corporations.

By Section 322, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and on payment of his proportion of any debt due from the corporation incurred while he was a stockholder, he is relieved from any further personal liability for such debt?

I am unable to reconcile these provisions with a construction of Section 349, which would give it the effect and operation contended for.

The Court is asked to order an assessment to be levied, in order that the assignee in bankruptcy representing the creditors may collect by suit from delinquent stockholders an amount sufficient to pay the debts of this corporation up to the limit of the par value of the shares held by them.

The section just referred to limits his personal liability for the corporate debts incurred while he is stockholder to such proportion of those debts as the number of shares owned by him bears to whole numbers of shares of the capital stock,

But if he is personally liable on the assessment to be levied, he may be obliged, if he is the only solvent stockholder, to pay the whole amount of the indebtedness of the corporation, provided it does not exceed the fanciful and exaggerated par value mentioned in the articles.

If, as in the case at bar, the whole number of shares is 100,000, at \$100 each, the stockholder who owns 1,000 shares is liable for one one-hundredth part of the debts. If the aggregate in-

debtedness is \$100,000 he acquits himself of all personal liability by the payment of \$1,000. But if he is liable to the amount of the par value of his stock, he may be compelled to pay \$100,000.

Will it be contended that a stockholder who has paid his full proportion of the debts incurred while he was a stockholder would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defense in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors to collect an assessment levied for the payment of debts.

It seems to me that such a position is wholly untenable.

I conclude therefore:

1. That the stockholders of mining corporations, organized as the corporation in this case was formed, incurred no liability *ex-contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company the nominal par value of their shares.

2. That unless they have subscribed for stock, or are the successors of subscribers, assessments levied on them can only be enforced by the sale of their shares.

3. That Section 349 does not create, and was not intended to create, any personal liability for assessment, unless from the terms of the stockholders' subscription such liability was incurred.

4. That the remedy of the creditor against the stockholder personally is limited, and defined by Section 322 of the Code, and his liability cannot be extended beyond the limits therein presented.

[This case is now before the Circuit Court upon a petition for review.]

New Law Publications.

MOAK'S UNDERHILL'S TORTS REDUCED TO RULES.

One vol., 824 pp. William Gould & Son, Albany. N. Y.

This is an extremely useful arrangement of a very valuable text-book, treating upon a subject governed by recondite, complex and technical rules, which are very numerous, and many of them remarkable for finely drawn distinctions. The work, though in the first instance intended by its author mainly for the use of students, has been so enlarged and amplified and supplied with such copious citations in the present, the first American edition, that, as remarked by its editor, Mr. Moak, it is well calculated to be of service to the experienced practitioner. The latter, amid

the bustle and varied calls of a laborious and exacting profession, will find this treatise remarkably well adapted to relieve him when called upon to examine matters coming within the scope of the subject which it discusses. The various authorities of the several State and Federal Courts are given and so arranged as to point out the sources where fuller and more particular information may be found, thus saving much valuable time and wearisome labor. In the particular branch of which it treats it will be difficult to find a more trustworthy or intelligent guide to the student, or assistant to the practitioner.

UNITED STATES MINERAL LANDS. Laws governing their occupancy and disposal. One vol., 560 pp. Henry N. Copp, Washington, D. C.

To use the words of the careful and competent compiler, the object of this work is to give the legal status of the mineral lands of the United States at the time of publication—1881. That purpose has been very fully attained, and will thus be found an indispensable aid in the daily business of nearly every lawyer on this Coast where transactions involving the acquisition and transfer of mining property are so frequent, general and extensive. The work contains the laws of the United States governing mineral lands, the regulations of the General Land Office, the rulings of that department, judicial decisions supplemented by a mass of useful information upon the subject in general. The whole is arranged in a most intelligible form well calculated to promote ease and completeness of reference. The compilation has not only a good general index, but also a list of names of individuals, forms, corporations, companies and claims which have in any way figured in the course of the adjudication of cases by the Courts or department, which greatly facilitate reference. Altogether, the book contains such a mass of information in so very an available form, that it will not fail to commend itself to the favorable notice of all persons interested in mining matters or mineral lands, whether lay or professional.

TREATISE ON THE LAW OF INJUNCTIONS. By James L. High. Second edition. Two vols., 1235 pp. Callaghan & Co., Chicago.

As is aptly observed by the learned author of this excellent work, the rapid growth and frequent resort to the aid of the law

of injunctions is one of the marked features of the jurisprudence of the present day. Whenever the nature of the proceeding will permit their use, the prohibitory and restraining powers of Courts of equity are now very generally invoked, if for nothing more, to retain the subject matter of litigation in *statuo quo* until the final determination of the dispute. Though the underlying principles upon which are founded the rules forming the law of injunctions are the same as formerly, still the sphere of their use has been immensely enlarged, and their application is governed with ever increasing liberality. The novel exigencies and wonderful changes of events occurring and vast interests created in the development and settlement of the great West have had the effect of moulding anew many of the rules of judicial conduct, as well in equity as in the common law branches of jurisprudence, causing their application to be governed with a sagacious elasticity. This condition of things has been very evidently appreciated by Mr. High, and the result is that his work forms a trustworthy and comprehensive text-book which is worthy of all acceptance. He deals with the law as it is, as it has been modified, and is administered by the present practice of the Courts, and evidenced by the very full list of authorities and extracts therefrom. The arrangement of the work is excellent, being well calculated to abridge labor and facilitate research. The notes and citations are very full, showing that no pains have been spared to render the work reliable in every respect, and well worthy the good opinion of the profession.

Facetiae.

IN A certain divorce case the male defendant had made default. The plaintiff had told a heart-rending story of extreme cruelty, and called one A. B. as a witness. A. B. took the stand, but no sooner had he been sworn than he demanded witness fees before he would give one word of evidence. The plaintiff's attorney thereupon proceeded to outwit the witness. Producing the coin he took a few steps toward Mr. B., then paused and said: "Before I pay you, I wish to be sure that you are the man I want. Are you the A. B. who boarded at the house of the parties, and saw the defendant beat the plaintiff and drag her across the floor by the hair?" "Yes, I am," responded the unsuspecting witness. "Well," said the attorney, as he returned the coin to his pocket, "I don't think I need you." The witness retired amid a general smile.

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No. 22.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed July 5, 1881.]

No. 10,628.

PEOPLE, APPELLANT,

VS.

EUGENE DALTON, RESPONDENT.

CRIMINAL LAW—INDICTMENT—VIOLATING SEPULTURE. An indictment accusing the defendant of violating sepulture, committed as follows: The said E. D., on etc., at et., without authority of law, disinterred and removed from its place of sepulture, at etc., the dead body of the late E. L., a human being; the said dead body not being the dead body of a relative or friend of the said E. D., contrary, etc., sufficiently charges the defendant with the offense of violating sepulture under Section 290 of the Penal Code. The Act of April 1, 1878 (Stats. 1877-8, p. 1050), does not repeal Section 290 of the Penal Code, but provides for a different offense. The Act of April 1, 1878, and Section 290 of the Penal Code are to be read together.

Appeal from Superior Court, San Francisco.

W. A. Nygh, for respondent.

Attorney-General Hart, for appellant.

By the COURT:

The indictment accuses the defendant of the crime of "*violating sepulture*, committed as follows: The said Eugene Dalton, on the eighth day of July, A. D. eighteen hundred and seventy-nine, at the said City and County of San Francisco, without authority of law, disinterred and removed from its place of sepulture, at Laurel Hill Cemetery, in said City and County of San Francisco, the dead body of the late Elias Lipsis, a human being; the said dead body not being the dead body of a relative or friend of the said

Eugene Dalton, removed for re-interment, contrary to the form, force and effect of the statute," etc. Defendant demurred.

Chapter VI of Title IX of Part I of the Penal Code is headed: "Violating Sepulture and the Remains of the Dead."

Section 290 of the Penal Code, being the first section of the chapter, reads: "Every person who mutilates, disinters or removes from the place of sepulture the dead body of a human being without authority of law is guilty of a felony; but the provisions of this section do not apply to any person who removes the dead body of a relative or friend for re-interment."

The Act of April 1, 1878 (Stats. 1877-78, p. 1050), provides for a different offense. It is entitled, "An act to protect the public health from infection caused by exhumation and removal of the remains of deceased persons." It makes it a misdemeanor to disinter or exhume the body or remains of any deceased person, "unless a permit shall first be obtained from the Board of Health, Health Officer or Mayor, or other head of the municipal government." It applies as well to the relatives or friends of the deceased as to all other persons.

If it should appear at the trial that defendant was a "relative or friend" of the deceased, Elias Lipsis, authorized by law to remove his remains, he cannot be found guilty of the offense last described, since the indictment fails to negative the fact that a permit may have been obtained. But the Act of April 1, 1878, does not repeal Section 290 of the Penal Code. The act and the section of the Code are to be read together. It was not the purpose of the former to authorize any person to disinter or remove a dead body, provided he should be able to satisfy the Mayor or Board of Health that it could be done without danger to the health of the living.

The question, then, is whether the indictment is sufficient to charge the felony described in Section 290 of the Penal Code. Before the amendments of 1880, that Code provided:

"Sec. 950. The indictment must contain: * * *
2. A statement of the acts constituting the offense, in ordinary and concise language," etc.

"Sec. 951. It may be substantially in the following form:

"The People of the State of California against A B, in the County Court of the County of—, at its—term, A. D. eighteen—:

"A B is accused by the Grand Jury of the County of —, by this indictment; of the crime of [giving its legal appellation, such as murder, arson, or the like, or designating it as a felony or misdemeanor], committed as follows: The said A B, on the—day of—, A. D. eighteen—, at the County of—[here set forth the act or omission charged as an offense.] "

"Sec. 958. Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

"Sec. 959. The indictment is sufficient if it can be understood therefrom: * * * 6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the Court to pronounce judgment, upon a conviction, according to the right of the case.

"Sec. 960. No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

In the indictment before us the "legal appellation" of the offense is given—"violating sepulture." Such is the appellation given to the offense described in the indictment by the Code itself. The act charged as the offense is set forth in ordinary and concise language, in such manner as to enable a person of "common understanding" to know what is intended, and to enable the Court "to pronounce judgment, upon a conviction, according to the rights of the case." The defendant is distinctly accused of having "disinterred and removed" the dead body of a human being without authority of law; and it is charged, in effect, that defendant was not a relative or friend of the deceased who removed the body for re-interment.

This is, in substance, and almost in exact words, the felony defined by the statute, and is sufficient. (*People vs. Garcias*, 25 Cal. 253; *People vs. Girr*, 53 Cal. 529; *People vs. Warr*, 20 Cal. 119; *People vs. Phipps*, 39 Cal. 326.)

Judgment reversed and cause remanded, with direction to the Court below to disallow and overrule the defendant's demurrer to the indictment.

DEPARTMENT No. 1.

[Filed July 18, 1881.]

No. 7554.

WHITTENBROCK, RESPONDENT,

VS.

BELMER ET AL., APPELLANTS.

PRACTICE—APPEAL—NEW TRIAL—NOTICE—JUDGMENT—MORTGAGE—PLEDGE—BANKRUPTCY—FORECLOSURE. It is error to grant a new trial as to one party in the absence of notice given to all of the adverse parties; but, *held*, the ruling of this Court upon a former appeal was the law of the case. An appeal from a judgment will not be dismissed, because a new trial has been granted as to some of the antagonistic parties. As to the parties as to whom the new trial was denied, the judgment stands and is appealable. In addition to the execution of a mortgage, and as part of the same transaction, the defendants pledged stock to the mortgagee, as a security for the payment of a note. Defendants were subsequently adjudged bankrupts. *Held*, there being no fraud in the pledging of the stock, that the assignee in bankruptcy was not entitled to it, but that it should be sold for the purpose of reducing the mortgage lien.

Appeal from Superior Court, Sacramento County.

A. C. Freeman, for appellants.

Haymond and Taylor, for respondent.

By the COURT:

As the case stands, a new trial on motion of the defendants John and Maria Bellmer has been granted as to plaintiff and denied as to the defendant or intervenor, William Kleinsorge. (*Whittenbrock vs. Bellmer*, No. 7173, December 17, 1880.) The defendant or intervenor, William Kleinsorge, and the defendants, John Bellmer and Maria Bellmer, occupied antagonistic positions in the action. In the absence of notice to all the adverse parties, the Superior Court should have denied the motion for a new trial as to all. That point was not made or considered by this Court at the former appeal, and the appeal was decided upon different principles. The ruling of the Court at the former appeal is the law of this case.

But the effect of the ruling upon the *judgment* of the lower Court is a matter now for the first time to be considered.

The present appeal is from the judgment of the Superior Court, and respondent moved to dismiss the appeal on the ground that there was no judgment when the appeal was taken.

A motion for a new trial is an application for a re-examination of the issues of fact. (C. C. P., 656.) It is an application to have the verdict or decision set aside, and is not

addressed to the judgment. (C. C. P., 657.) When the new trial is granted as to all the parties, the whole judgment falls as an incident to the vacation of the verdict or decision. Where a new trial has been granted as to some of the antagonistic parties (the cause having been tried by the Court), it is apparent that the findings are set aside which determine the rights of such parties, and as to them the case stands as if it had never been tried. The judgment, so far as it affects the rights of the moving party and the adverse parties with respect to whom the new trial has been granted, comes to naught with the findings by which it was supported. But the judgment and findings, in so far as they purport to determine the rights of the moving party and those as to whom the new trial has been denied, continue to exist, and the judgment is appealable. The motion to dismiss should therefore be denied. The Court below found "that John Bellmer (defendant), for the purpose of securing the payment of said note (the note to secure which the mortgage was given), and as a part of said transaction, and for no other purpose, pledged to said corporation 15 shares of stock of said corporation by endorsement thereon and assignment thereof, which stock then and theretofore stood in the name of said John Bellmer on the books of said corporation, which said stock was delivered to said corporation. That said stock is now worth \$1,590."

The findings show that the stock thus pledged to the Germania Building and Loan Association, the corporation referred to, was never specially assigned to plaintiff. The stock was delivered by the corporation to defendant, William Kleinsorge, who claims the right to detain the same as assignee in bankruptcy of John Bellmer and Charles Kleinsorge, bankrupts, as part of the partnership assets of said John and Charles.

The note and mortgage were executed by John Bellmer and Charles Kleinsorge, and it clearly appears in the findings that the stock was pledged by both "as part of the same transaction." The transaction occurred February 18, 1875, and John Bellmer and Charles Kleinsorge were not adjudicated bankrupts until February 27, 1878. There is no suggestion that the pledging of the stock was fraudulent, or that the pledgors were indebted at the time of the contract between the corporation and themselves.

There can be no doubt that William Kleinsorge, as assignee in bankruptcy, can have no property in the stock which is not subject to the lien of plaintiff as assignee of the promissory note, and that the appellants may insist that it be sold and

the proceeds applied to the mortgage note, to reduce the lien on the land and the personal liability of John Bellmer.

Motion to dismiss denied, and judgment reversed and cause remanded for a new trial.

DEPARTMENT No. 1.

[Filed June 24, 1881.]

No. 6786.

CARR, RESPONDENT, vs. QUIGLEY, APPELLANT.

PATENT—RESERVED GOVERNMENT LANDS—EJECTMENT—W. P. R. R. Co.
Land within a United States Government reservation did not pass, by patent, to the Western Pacific Railroad Company. *Newhall vs. Sanger* (92 U. S. 761). A patent issued by the officers of the United States, which they have no authority, under any circumstances, to issue, is void, and may be attacked collaterally.

Appeal from Third District Court, Alameda County.

M. Mullany, for appellant.

William Irvine, for respondent.

By the COURT:

Ejectment. Plaintiff deraigned from the Western Pacific Railroad Company. Defendant offered to prove that the lands in controversy were, at the time when the lands along the line of the road were withdrawn from pre-emption, private entry and sale, within the limits of a Mexican grant then *sub judice*, and therefore within a "Government reservation" as that expression is used in the Act of Congress of 1864. (13 Stats. 358.) We think the Court below erred in sustaining the objection to this proof. If the land was within a reservation it did not pass by the patent to the railroad company. It was so held in *Newhall vs. Sanger*, 92 U. S. 761. In effect the officers of the Government were expressly prohibited from issuing to the company a patent purporting to convey the lands thus reserved. The case comes within the doctrine laid down in *Doll vs. Meador*, (16 Cal. 295), and the cases subsequently recognizing the authority of that case. The validity of a patent purporting to grant lands which the officers of the Government have no authority, under any circumstances, to convey, may be controverted in any action, directly or collaterally. The patent is void, and a defendant in an action of ejectment may prove the facts showing its invalidity.

Judgment and order reversed, and cause remanded for a new trial.

Opinions Previously Omitted.

DEPARTMENT No. 1.

[Filed October 14, 1880.]

No. 6683.

BARFIELD, RESPONDENT,

vs.

MARKS AND JOHN F. McSWAIN, APPELLANTS.

CONTRACT—COVENANT—MORTGAGE—EQUITY OF REDEMPTION—CONSIDERATION JUDGMENT—LEGAL ESTATE—FORECLOSURE. In consideration of the conveyance of an equity of redemption, the grantees covenanted, that when the mortgage on the land was foreclosed, they would see that no personal judgment was entered against the mortgagor. After foreclosure, a judgment for deficiency was entered against the mortgagor. It did not appear that plaintiff or her assignor paid the amount of the judgment rendered against the latter: *Held*, that plaintiff was entitled to recover the amount of the personal judgment. The estate of a mortgagor is a legal estate.

Appeal from Thirteenth District Court, Merced County.

C. H. Marks, for appellants.

Wiggington & Farrar, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

The complaint is in substance as follows:

The above named plaintiff, complaining of the above-named defendants, alleges:

That on or about the first day of September, 1877, the said defendants entered into the following contract, in writing, with A. C. McSwain, to wit:

"For value received, we hereby agree with A. C. McSwain, that when the mortgage of Mrs. Margaret Barfield against him is foreclosed, if there should be any foreclosure, that we will see that no personal judgment is taken against him. That is, we will see that the land, if sold under such decree of foreclosure, sells for sufficient to pay the amount due her from said mortgagor, under the terms of said mortgage.

"Merced, Cal., Sept. 1, 1877.

"C. H. Marks,

"Jno. F. McSwain."

That the consideration expressed in said contract as valuable, was the conveyance by deed from the said A. C. McSwain, to the said C. H. Marks and John F. McSwain, the defendants herein, the following described real estate, situated in the County of Merced, State of California, to wit [here follows a description of the lands]:

"That the mortgage referred to in said contract as 'the mortgage of Mrs. Margaret Barfield against him,' was a mortgage which the plaintiff herein, at that time, to wit, September 1, 1877, held against the same A. C. McSwain, in words and figures following to wit:" And here is recited the mortgage at length:

"That on the 15th day of November, 1877, the said Margaret Barfield commenced an action in this Court to foreclose said mortgage, and that, afterwards, to wit, on the 29th day of March, 1878, the said Margaret Barfield did obtain from this Court a decree of foreclosure and personal judgment against said A. C. McSwain in said action, which said decree of foreclosure and sale is in words and figures following, to wit:" And then follows the decree at length, with a statement of certain subsequent proceedings, and then the averment.

"That afterwards, to wit, on the 3d day of May, 1871, a personal judgment against the said A. C. McSwain in said action, was by the Clerk of this Court entered upon the Judgment Docket of this Court for the sum of six hundred and eighty-six and 50-100 dollars, gold coin of the U. S., with interest thereon at the rate of ten per cent per annum. That upon the entering of said personal judgment in said action against the said A. C. McSwain, as aforesaid, the defendants herein became liable, upon the contract above set forth, in the sum for which personal judgment was so entered to wit, \$686 50-100 with interest as aforesaid."

The plaintiff further alleges an indorsement by A. C. McSwain, of the contract first recited, and that there is now owing upon the said contract \$686 50-100 with interest at ten per cent per annum, which plaintiff has demanded. The prayer is for judgment for the amount named and interest and costs.

Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, etc.

The complaint does not allege that plaintiff or her assignor has paid the personal judgment rendered against the former, or any part thereof.

The foregoing assignment relieves the case of many of the embarrassing questions elaborately considered by Mr. Sedgwick in his treatise on *The Measure of Damages*, (7 ed., vol. 2, chap. 11. See also, in addition to the cases there cited, *Jones vs. Childs*, 8 Nev. 121.) The contract of defendants amounted at least to a covenant to discharge or acquit the mortgagor from any personal judgment on the foreclosure of plaintiff's mortgage. The breach was well assigned by the

avermment that personal judgment had in fact been entered against the mortgagor, and *non damnificatus* would not have been a good plea under the former system of pleading. (*Thomas vs. Allen*, 17 Johns. 146.)

The contract of defendants, was that no personal judgment should be taken against the assignor of plaintiff, and further, that the land mortgaged, if sold under a decree foreclosing the Barfield mortgage, should sell for sufficient to pay the amount due upon that mortgage. These promises were based upon a valuable consideration, to wit: A transfer of the equity of redemption. By such transfer the assignor of plaintiff paid defendants to prevent any personal judgment against him. He afterwards found that he was liable for, and if able, must pay the judgment which defendants had agreed to pay for him. We speak advisedly in saying defendants had agreed to pay it for him, in case such judgment should be entered. It was their bounden duty to see to it that the property brought a sum sufficient to pay off the mortgage by bidding, if necessary, at the sale; but, if they neglected to do this, it would be substituting apparition for substance to say that it was not also their duty to pay the personal judgment for the balance. It would certainly be a defense to this suit that defendants had satisfied the judgment. Their contract was that no personal judgment should be entered. They could perform it literally only by becoming (or causing some one else to become) the purchaser at the foreclosure sale for a sum equal to the amount of the mortgage, or by paying to the mortgagee the difference between the sum for which the sale was made and the amount of the mortgage, interest and costs, before the personal judgment was entered. They could perform it substantially by satisfying the judgment after it was entered. The equity of redemption assigned by the mortgagor to defendants was valued by the parties to the assignment at a sum equal to the amount of any personal judgment which might be entered against the mortgagor. So far, the amount of damages which the assignor of plaintiff might sustain by reason of a breach by defendants, was liquidated by the contract itself. The equity of the mortgagor has been foreclosed, and cannot be recovered; its stipulated value may.

Of course, in what has been said, the words "equity of redemption" are applied to the estate of the mortgagor merely as a convenient mode of expression. The estate of the mortgagor is a legal estate.

Judgment affirmed.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 2.

[Filed November 5, 1880.]

No. 6138.

JOHN LIEBRAND, APPELLANT,
vs.
GEORGE OTTO ET AL., RESPONDENTS.

GRANT—CONDITION SUBSEQUENT—DEMAND—ACTION TO QUIET TITLE—DEED—GIFT TRUST—RIGHT OF WAY. Plaintiff executed a deed of trust to defendants for the Santa Cruz R. R. Co., conditioned that the company would have a right of way, etc., over land described, and that it (the company) would erect certain improvements, etc.; the company neglected to erect the improvements within the time agreed or within a reasonable time thereafter: *Held*, that plaintiff could maintain an action to quiet title against the trustees and the company, and that a demand for performance by defendant (company) was not necessary. A party in possession of real property may maintain an action to quiet title. A grant upon condition subsequent, which is subsequently defeated by the non-performance of the condition, entitles the grantor to a reconveyance from the grantee by a deed duly acknowledged for record.

Appeal from Twentieth District Court, Santa Cruz County.

F. J. McCann, for appellant.

Younger, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

The appeal in this case is taken from a final judgment of the late District Court of Santa Cruz County on a demurrer to the amended complaint.

The material averments to the pleading are, that the defendant, the Santa Cruz Railroad Company, is a corporation duly organized under the laws of this State for the purpose of constructing, conducting and maintaining a railroad from the city of Santa Cruz to a point called Pajaro, near Watsonville. That on the eighteenth day of September, 1873, the plaintiff was, and still is, the owner in fee of a certain tract of land in the city of Santa Cruz (which is particularly described in the amended complaint) upon which the plaintiff had erected an eating-house, bath-house, etc. That at the time above mentioned the defendant, the Santa Cruz Railroad Company, proposed to construct, complete and equip a railroad for passengers and freight from Santa Cruz to Pajaro, and applied to the plaintiff to obtain from him a right of way over his said tract of land, and also a small piece or parcel of said land for a railroad depot. That on the eighteenth day of September, 1873, plaintiff executed and

delivered to the defendants, Cappelman and Otto, a certain deed of trust whereby he granted to them, in trust for the said railroad company, upon certain conditions to be performed by said railroad company, the following parcels of land, to-wit: 1. A strip of land running east and west across the tract of land above described, as wide as necessary for the road-bed, maintenance and operation of said railroad, not exceeding five hundred feet in width; and 2d, two acres of land above described for the purpose of building thereon a railroad depot and shops. That the conditions upon which the parcels of land were granted were to the following effect: 1. That the Santa Cruz Railroad Company should, within a reasonable time after the date of the deed, locate and occupy the lands granted, and should construct its railroad and buildings thereon. * * *

3. That the parcel of two acres should be located as a square in the southwest corner of the twenty-acre tract described in the complaint, and should be used exclusively for the purpose of a railroad depot. 4. That within two hundred days after the occupation of said lands, such parts thereof as should be located within the inclosure of plaintiff should be inclosed by the railroad company with a good and substantial fence at the expense of the company; and 5th, that should either of said granted parcels of land cease to be used for the purpose for which it was granted, or should it be use for other purposes, said land should revert to the plaintiff. That no money or other valuable consideration passed at the time for said land, and the plaintiff executed the deed therefor solely upon the representation of the trustees, Cappelman and Otto, that the railroad company would build its depot and shops upon the said two-acre tract as soon as the road should be finished, and that without such representations the conveyance would not have been made. The amended complaint further avers that the representations aforesaid were authorized by the company; that they were false, and were made fraudulently with the intent to deceive plaintiff and to obtain from him, without any consideration, the two acres of land which are in controversy in this suit. The amended complaint further avers that under and by virtue of said deed, the defendant, the railroad company, on or about the twentieth day of May, 1875, located upon and occupied the piece of land granted for a road-bed, and on or about the thirtieth day of June, 1875, completed and equipped its road for passenger travel between the two points above named. There is also an averment in the amended complaint that the defendants

never have at any time entered into possession of the two-acre tract, and that they have failed to perform any of the conditions mentioned in the grant with respect to the two-acre tract. There is also an allegation of the following breaches: "That the said defendant, the Santa Cruz Railroad Company, has not, within a reasonable time from the completion of its road, or at any time since the date of the deed, used the said two-acre tract or any part thereof, for the purpose of a railroad depot or railroad shops. 2. That the said railroad company has never at any time, built upon any portion of said two-acre tract of land a railroad depot or railroad shops. 3. That said railroad company has not, at any time inclosed any part of said two acres of land, with a fence or other inclosure. * * * * That instead of building a railroad depot and railroad shops on the said two-acre tract, the said railroad company, at the time of its completion of its road, selected another and a different place for its depot and shops at a point about one mile distant from said two-acre tract, and has kept and maintained, and still continues to keep and maintain, them at that point."

The plaintiff complains that the trust deed is a cloud upon his title, and prays that the defendants may be compelled to reconvey to him, and that they be declared to have no right, title or interest in the said two-acre tract of land. To the foregoing amended complaint a demurrer was interposed on behalf of the defendants, and the same was sustained by the Court.

The first point made in the defendants' brief is that "a demand on the defendants should have been alleged, either to perform the conditions named in the conveyance, or to reconvey the property to the plaintiff." Was a demand necessary in this case to place the defendant, the railroad company, in default?

The averment of the complaint is "that within two hundred days after the occupation of such lands, such parts thereof as should be located within the inclosure of plaintiff, should be inclosed by said railroad company with a good and substantial fence at the expense of the company;" and there is an additional averment that the trustees represented to the plaintiff that the company would build its depot and shops on the two-acre tract as soon as the road was completed. These allegations are admitted by the demurrer. The amended complaint avers that not only has the defendant, the Santa Cruz Railroad Company, neglected to enter upon the two-acre tract (although its road was

completed and equipped in June, 1875), but that it has, in fact, abandoned the intention of using the tract in question for the purposes designed by the gift, and has selected another point for the location of its depot, one mile distant from the land in question.

On the necessity for a demand it is said: "The rule in respect to demand rests upon the same principle with that in respect to notice. It may be requisite either from the stipulations of the parties or from the peculiar nature of the contract; but where not so requisite, he who has promised to do anything must perform his promise in the prescribed time and in the prescribed way; or, if none be prescribed, in a reasonable time and in a reasonable way, without waiting to be called upon." (2 Parsons on Contracts, p. 671.)

Story, in his work on Contracts (vol. 2, sec. 971), says: "Another question to be considered is, when notice and request to perform are necessary, the rule is, that where the right to claim the performance of a contract depends upon the occurrence of a certain fact, the promisee is not bound to give notice thereof to the promisor, unless the contract be to be performed on condition that notice is given; or unless the fact be peculiarly within his knowledge; or unless it be reasonably proper under the circumstances of the case. So, also, a request to perform need not ordinarily be averred."

In this case now under consideration the averment is that the railroad company promised to do a certain thing within two hundred days after they occupied the lands for the purposes of their road, to wit, that they would build a good and substantial fence around the two-acre tract, and would within a reasonable time thereafter construct a depot thereon. The averment is that they did not inclose the land, and did not construct a depot on the tract, although a reasonable time for that purpose had elapsed since the completion of their road, and furthermore that they had abandoned the intention of doing so, as was manifested by the fact that the company had chosen another site for its depot. In our opinion no request or demand was necessary under the facts of this case. (*Gray vs. Dougherty*, 25 Cal. 266; *Jones vs. City of Petaluma*, 36 Id. 230.)

There is but one other point which we deem it necessary to examine, and that, in the language of the demurrer, is, that it is not alleged why plaintiff lingered so long before bringing this suit. It will be remembered that plaintiff has been in possession of the land ever since the execution of the deed, and that the object of this proceeding is to remove the cloud which the deed casts upon his title. Section

738 of the Code of Civil Procedure provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; and in the case of *Arrington vs. Liscom*, 34 Cal. 370-1, the Court says: "We know of no reason why a party who has been in adverse possession for a period of time, which, under the Statute of Limitations, vests him with a title against all the world, may not bring his suit against a party claiming under a record title to have the claim determined and adjudged null and void against him. An apparently good record title would certainly be a cloud upon the title acquired by adverse possession under the Statute of Limitations. It is of record, and when produced makes out a *prima facie* case, which can only be defeated by evidence of adverse possession, which is not of record unless established in a judicial proceeding, but rests in parol, and is liable to be lost and established with difficulty. Such an apparent record title could not fail to be a cloud that would greatly decrease the value of the title acquired by adverse possession. The Statute of Limitations, as against a party claiming under a written title, would have performed but half its mission, as a statute of repose, if the party relying upon it must wait till he is attacked before he can reduce the evidence of his title to the form of a permanent record. We think a party in possession, whose right is perfected by an adverse possession during the period prescribed by the Statute of Limitations, as well as others, is entitled to bring his action, under section two hundred and fifty-four of the Practice Act to determine an adverse claim or remove a cloud which would thenceforth diminish the value of his property. In this case the cause of action set up is an adverse possession of some twelve years, under a conveyance which gives a title under the Statute of Limitations, and an outstanding conveyance from the same source of title, which, under the circumstances alleged, became a cloud, and which the plaintiff asks to have adjudged to be a cloud, and to have removed."

The above case is a full answer to the objection that plaintiff did not bring his suit in time.

We have thus far treated the case as a proceeding in equity to remove a cloud upon plaintiff's title; but it might also be considered as a suit brought under Section 1109 of the Civil Code, which provides that "where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property

to the grantor or his successors, by grant duly acknowledged for record."

If the grantee has failed to perform the conditions upon which the grant in this case was made, it is its duty, under the foregoing provisions of the Civil Code, to reconvey the property to its grantor.

It is suggested in the respondents' brief that plaintiff has an adequate remedy in a court of law. But we do not think that he has. He is in possession of the land, and therefore cannot bring ejectment; and we are not aware of any other legal remedy by which he could obtain the relief prayed for in this suit.

Judgment and order reversed, and cause remanded, with instructions to the Court below to overrule the demurrer to the amended complaint.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed October 20, 1880.]

No. 10,561.

PEOPLE, RESPONDENT, vs. GRIGSBY, APPELLANT.

CRIMINAL LAW—HOMICIDE—INSTRUCTION—DECREE. An instruction: "If you find from the evidence * * * that defendant did * * * with malice aforethought, unlawfully kill * * * then you will find the defendant guilty of murder in the *first degree* is erroneous.

Appeal from Superior Court, San Luis Obispo County.

Graves & Graves, for respondent.

Dillard & Venable, for appellant.

McKINSTRY, J., delivered the opinion of the Court:

The Court charged the jury: "If you find from the evidence beyond a reasonable doubt that the defendant did, on the twenty-eighth of February, 1880, with malice aforethought, unlawfully kill Vivian Torres, then you will find the defendant guilty of murder in the *first degree*."

If the instruction is correct, *murder* of the second degree is the unlawful killing of a human being *without malice*. But the Attorney-General properly admitted the instruction to be erroneous.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed October 26, 1880.]

No. 7179.

BROOKS, APPELLANT.

VS.

RICE AND BECKWITH, RESPONDENTS.

MORTGAGE—PRIOR LIEN—FORECLOSURE—DECREE—SEPARATE MORTGAGE—NOTICE. Defendant Rice executed to plaintiff's assignor a mortgage on several tracts of land, of which two had previously been mortgaged to defendant Beckwith, which mortgage was on record at date of execution of plaintiff's. Upon a foreclosure by plaintiff, the Court below decreed that all of the property should be sold excepting that portion mortgaged to Beckwith: *Held*, on appeal, that Court should have decreed a sale of all the property—that portion not embraced in the mortgage to Beckwith to be *first* sold and the proceeds paid over to plaintiff, the surplus to be paid to subsequent purchasers from Rice. If there should not be sufficient realized to pay plaintiff, that the tracts mortgaged to Beckwith should then be sold, his (B.'s) debt paid, and the plaintiff to receive the surplus towards paying his mortgage, the balance to be paid to the subsequent purchasers from the mortgagor.

Appeal from Superior Court, Ventura County.

N. Blackstock, for appellant.

Bledsoe and Petinos, for respondents.

By the COURT:

The Court is of opinion that the judgment in this cause should be so modified as to direct the foreclosure of the mortgage held by plaintiff as to all the property mentioned in it; that the property embraced in the mortgage of plaintiff and not embraced in the mortgage to Beckwith, set on foot by the judgment, should be first sold, and the proceeds paid over to the plaintiff, to the extent of his debt and costs, and any surplus remaining to the defendants, purchasers from the mortgagor. If the proceeds of such sale should be insufficient to pay off plaintiff's mortgage, that then the remaining property embraced in his mortgage should be directed to be sold, and the proceeds of the sale applied to the payment of the mortgage to Beckwith, and, if any surplus remains, to the payment of the mortgage of the plaintiff. If anything remains after such payment last mentioned, it should be paid over to the purchasers from the mortgagor.

The cause is remanded that the modifications above pointed out may be made by the Superior Court of the County of Ventura. The appellant to recover the costs of this appeal.

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No. 23.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed July 18, 1881.]

No. 7665.

FAIRBANKS, RESPONDENT, vs. WILLIAMS, APPELLANT.

DAMAGES—CONVERSION—FINDINGS NOT SUSTAINED BY EVIDENCE. In an action to recover damages for forcibly taking and entering into the possession of personal property, the measure of damages is a fair compensation for the time and money properly expended in pursuit of the property: *Held*, in this case, the evidence did not justify the findings that plaintiff necessarily paid out counsel fees and traveling expenses and wages in procuring the restoration of the possession of the property.

Appeal from Superior Court, Amador County.

Flournoy & Mhoon and Eagan & Phelps, for appellant.
Lynch and Porter, for respondent.

By the COURT:

This is an action to recover damages from defendant for forcibly taking and entering into the possession of certain property of plaintiff, and depriving plaintiff of the use, possession and control thereof, from November 4, 1879, until January 19, 1880.

The property is described in the complaint.

"One twenty-stamp quartz mill, with the engines, hoisting works, tools and all other machinery connected with said mill; also, 368 cords of firewood; also, sixty round timbers, each from twelve to fourteen feet long; also, twenty-five short timbers, each five to nine feet long; also, three hundred bushels, more or less, of charcoal; also, a blacksmith-shop and tools thereunto belonging"—all situated on a certain tract of land particularly described.

The Court below expressly found that there was no evidence of any wrongful design or willful misconduct tending to aggravate the trespass, and that plaintiff was not entitled to recover exemplary or vindictive damages.

But as direct and proximate damages the Court found:

"Seventh—That the plaintiff necessarily paid, laid out and expended \$285 as fees and necessary traveling expenses of counsel for advising the plaintiff in the premises and conducting the proceedings necessary on the part of the plaintiff in procuring the restoration of the possession of said property.

"Eighth—That the plaintiff necessarily paid to Frank J. Fairbanks the sum of \$526.38 as wages and traveling expenses in aiding the plaintiff in procuring the restoration of the possession of said property."

It may be admitted (but is not here decided) that the record before us shows which of the articles of property alleged to have been detained were personal property; and that such articles were converted.

Section 3333 of the Civil Code authorizes a jury to find damages for the detriment proximately caused, and is, so far, declaratory of the common law. It leaves the question as to what are proximate damages where it was. The second subdivision of Section 3336 of the same Code permits a plaintiff in an action for the wrongful conversion of personal property to recover "a fair compensation for the time and money properly expended in the pursuit of the property."

So far as the case shows, the property attached in *Williams vs. The Loyal Lead Company* was released by the plaintiff in that action (defendant in this) voluntarily. The only evidence bearing in any degree upon the question of release is found in the testimony of the present plaintiff, who says: "A few days after the attachment I referred all my evidence of title to Mhoon (attorney for plaintiff in the attachment suit), who seemed to be satisfied, and said he would order the attachment released."

The same witness further says: "I forget how much I paid Frank (Frank J. Fairbanks), and I think I paid Lynch about \$270 for expenses in getting the property released." It is true he adds: "The amounts stated in the complaint are correct."

The complaint alleges that "Vorgan, as agent of defendant, demanded that plaintiff should make due and lawful proof of his ownership of the property, and that plaintiff was compelled to retain counsel and pay said counsel \$285 as fees and necessary traveling expenses for advising the plaintiff in the premises and conducting the proceedings necessary on plaintiff's part in proving his ownership and possession of the property; and that plaintiff was compelled to employ Frank J. Fairbanks, whose knowledge, testimony and services

were absolutely necessary to plaintiff in procuring such restoration, and was obliged to pay said Frank J. Fairbanks \$526 as wages and traveling expenses, and money laid out in aiding plaintiff as aforesaid."

The foregoing averments of the complaint are specifically denied by the answer.

The Court below failed to find on the issues thus joined.

The statement of the plaintiff, as a witness, that "the amounts stated in the complaint are correct," taken in connection with what precedes it, is, giving the words their broadest signification, only a declaration that he had actually paid such amounts. They do not purport to be an avowal that the amounts paid were just and reasonable for the services performed, or that the money was "properly expended." (C. C. P., 3336.) The witness could not determine the question of the propriety or necessity of the expenditure. That was a matter for the Court to determine.

The Court did determine it in findings seven and eight, above quoted. But there is no evidence in the transcript to sustain the findings that plaintiff necessarily paid \$285 to counsel, or \$526.38 to Frank J. Fairbanks. Assuming for the purposes of this appeal that Section 3336 of the Civil Code is applicable, the plaintiff could only recover "a fair compensation for the time and money properly expended in pursuit of the property."

We are of opinion that the interests of justice will be subserved by a new trial of this action.

Judgment reversed and cause remanded for a new trial.

DEPARTMENT No. 2.

[Filed June 15, 1881.]

No. 10,657.

EX PARTE PATRICK RUSH, ON HABEAS CORPUS.

CONTEMPT—HABEAS CORPUS.—If the provisions of sections 1212 of the C. C. P., relative to contempts, are not complied with, a party adjudged guilty of a contempt will be discharged on habeas corpus.

Goff, for petitioner.

Smoot and *Quint*, contra.

By the COURT:

The proceedings required by section 1212 of the Code of Civil Procedure to bring the petitioner into contempt, were not taken, and therefore he should be discharged. It is so ordered.

IN BANK.

[Filed June 15, 1881.]

No. 6582.

THE ST. HELENA WATER COMPANY, RESPONDENT.

VS.

FORBES, APPELLANT.

CONDEMNATION OF WATER BY PRIVATE CORPORATION. There is no statute of this State conferring authority upon a private corporation to condemn water rising or flowing in its natural course on the land of a private individual, for the purpose of supplying a town.

Appeal from the Seventh District Court of Napa County.

McAllister & Bergin, for appellant.*B. S. Brooks*, for respondent.

By the COURT:

Assuming that the Legislature has the power to authorize the condemnation of water that rises or flows in its natural course on the land of a private individual, by a private corporation for the purpose of supplying a town with water, we do not find such authority anywhere conferred in the statutes.

Judgment and order reversed.

IN BANK.

[Filed July 23, 1881.]

No. 6786.

CARR, PETITIONER, VS. QUIGLEY, RESPONDENT.

PATENT—GOVERNMENT RESERVATION—EVIDENCE. Department No. 1 having held (opinion filed June 24, 1881) that evidence was admissible to show that lands covered by a patent from the United States to W. P. R. R. Company were, at the time of the issuance of such patent, within a Government reservation: *Held*, upon application for hearing in bank, that the decision of the Department comes within the rule laid down in *McLaughlin vs. Powell*, 50 Cal. 64.

William Irvine, for petitioner.*M. Mullany*, for respondent.

By the COURT:

The rehearing is denied. The decision comes within the rule laid down in *McLaughlin vs. Powell*, 50 Cal. 64.

IN BANK.

[Filed July 13, 1881.]

No. 7232.

MONTGOMERY, RESPONDENT.

VS.

HARRINGTON, APPELLANT.

FORMER ACTION PENDING—DELIVERY OF DEED BY ONE HAVING NO TITLE—

DEED—CONDITION PRECEDENT—CONTRACT. In an action to recover money upon a written contract it was contended that a former suit was pending for the same cause of action. The complaint in this action contained, in addition to the allegations of the former complaint, an allegation of delivery of a deed to land (to which plaintiff had no title, legal or equitable): *Held*, that if delivery of the deed was *not* a condition precedent to plaintiff's right to maintain the present action, the former action was a bar; but that if delivery of such deed was a condition precedent, a delivery or tender of a deed for land to which plaintiff had no title, legal or equitable, was ineffectual—such deed being a nullity. The test for determining whether the cause of action is the same in both cases is, would the evidence, which is sufficient to support the judgment in the second action, have authorized a judgment for plaintiff in the first.

Appeal from Superior Court, Colusa County.

Hart, Van Clief and Dyas, for appellant.*Goad, Bayne and Albery*, for respondent.

SHARPSTEIN J., delivered the opinion of the Court:

If the delivery or tender of a deed by the plaintiff to the defendant of land to which the plaintiff had no right, title or claim, either in law or equity, was not a condition precedent to his right to maintain this action, the pendency of another suit between the same parties for the same cause of action was well pleaded and proven by the defendant. If the plaintiff's right of action had depended upon his delivery or tender to the defendant of a deed of the land described in the complaint, the fact of the plaintiff having no right, title or claim to the land either in law or equity would have rendered such delivery or tender wholly ineffectual. A deed in form which conveyed no title or interest whatever in the land was utterly void, and of less value than a sheet of blank paper. The allegation therefore in respect to the delivery or tender of a deed was wholly immaterial, and being so, the complaint in the latter action is essentially the same as that in the former action. If the evidence is sufficient to support the judgment in the present action, it would have authorized a judgment for the plaintiff in the former action; and that is the test for

determining whether the cause of action is the same in both cases. (*Taylor vs. Castle*, 42 Cal. 367.)

The defendant was entitled to a judgment in his favor upon his plea of a former suit pending for the same cause of action.

Judgment and order reversed.

We concur: Ross, J., McKinstry, J., Thornton, J., Morrison, C. J.

Opinions Previously Omitted.

DEPARTMENT No. 1.

[Filed October 20, 1880.]

No. 10,561.

PEOPLE, RESPONDENT, vs. GRIGSBY, APPELLANT.

CRIMINAL PRACTICE—APPEAL—NOTICE OF SERVICE—ACCEPTANCE OF DUE SERVICE—DISMISSAL. A motion to dismiss an appeal in a criminal case on the ground that service of the notice of appeal was made before it had been filed will be denied, it appearing that "due service" of the notice had been accepted by the District Attorney.

Appeal from Superior Court, San Luis Obispo County.

Graves & Graves, for the motion.

Dillard & Venable, contra.

McKINSTRY, J., delivered the opinion of the Court:

The Attorney-General moves to dismiss the appeal, on the ground that the transcript shows the notice of appeal to have been served before it was filed.

The Penal Code, Section 1240, provides: "An appeal is taken by filing with the Clerk of the Court in which the judgment and order appealed from is entered or filed, a notice, stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

The notice of appeal, as appears from the record before us, is dated September 6, 1880, and was filed September 7, 1880.

On the notice filed is an acceptance of service in words following: "I hereby acknowledge due service upon me of a copy of the above notice. (Signed) Ernest Graves, District Attorney."

If the law requires the service to be made *after* the notice is filed (a question we do not decide in this case), here is an admission of "due service," which must be construed service after the filing.

The motion to dismiss the appeal is denied.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed October 25, 1880.]

No. 6688.

TURNER, RESPONDENT, VS. MAHONEY, APPELLANT.

PRACTICE—FINDINGS—DEMURRER—DECREE—ERROR WITHOUT PREJUDICE—
STATUTE OF LIMITATIONS. A finding "that no part of said judgment and decree has ever been appealed from, set aside or paid;" and, "that the balance of said notes with the interest thereon remains unpaid," is sufficient to show that the judgment and notes have not been paid. Conflicting evidence will not be reviewed. No injury results to a defendant, if after overruling a demurrer to a complaint which showed items barred by the statute of limitations the Court upon the trial credits the defendant with the items and also in its decree.

Appeal from Fifth District Court, Stanislaus County.

Dudley, Terry and McKinne, for appellant.

Byers & Elliott and Budd, for respondent.

MYRICK, J., delivered the opinion of the Court:

Appellant makes two points, viz: 1. That there is no direct finding that any sum of money was due from defendant to plaintiff. 2. The second finding is against the evidence.

First—The Court finds the fact of the judgment and "that no part of said judgment and decree has ever been appealed from, set aside or paid." The Court also finds the execution and delivery of the promissory notes, the amounts paid thereon, and "that the balance of said notes with the interest thereon remains unpaid." It seems to us that these findings are sufficient. If a judgment has been rendered against A, and if that judgment has never been appealed from, set aside or paid, it follows that the amount of it is due. So, as to the promissory notes. The above findings are equivalent to a specific finding that the amount is due.

Second—The plaintiff testified: "I had no agreement with the defendant to take his note in payment of this decree; he said he would pay me the amount he owed me *and give me more, too*, and he gave me this note as a present." This evidence was in conflict with the evidence of defendant, and the Court below decided between them. Such decision will not be reviewed here. The consideration for the present might well be the support plaintiff was rendered to the daughters of the parties.

The demurrer should have been sustained as to the items \$50, \$66.25 and \$37.50, it appearing on the face of the complaint that they were barred by the statute of limitations; but, as the Court, in its findings, found that those items

were barred, and excluded them from the judgment, no harm has arisen to defendant.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed October 14, 1880.]

No. 6957.

IN THE MATTER OF THE ESTATE OF ANDRES
PICO.

ADMINISTRATION — ESTATE OF DECEASED PERSON — ILLEGITIMACY — FORMER ADJUDICATION. Upon application by petitioner to have letters of administration issued to P. revoked on the ground of the incapacity of P. to act, and that letters be issued to petitioner as heir of deceased, it appearing that upon a former proceeding in the case petitioner had been adjudged to be an illegitimate person: *Held*, that such adjudication estopped petitioner from subsequently asserting that he was heir of deceased: *Held*, further, that as the administrator was incompetent to act, and had been removed, the Court had power to appoint petitioner in his stead, notwithstanding his illegitimacy.

Appeal from Probate Court, Los Angeles County.

Glassell, Smith & Smith, for appellants.

Thom & Ross, and *Brunson & Wells*, for respondents.

THORNTON, J., delivered the opinion of the Court:

On the ninth of July, 1879, Romulo Pico filed a petition in the Probate Court for the County of Los Angeles, alleging that Andres Pico died intestate, in the county aforesaid, on or about the fourteenth day of February, 1876, leaving property in said county of the value of or about \$20,000; that on the eighteenth of October, 1877, Pio Pico was duly appointed administrator of said estate, and on the same day duly qualified as such administrator, and from that day was the acting administrator of said estate; that on the thirtieth of October, 1877, said Court made an order requiring said administrator to publish notice to creditors required by law, which the administrator has wholly failed and neglected to do; that said administrator has wholly failed and neglected to have made and returned to the Court any inventory or appraisement of said estate; that the administrator has paid no claims against said estate, though several have been presented and allowed, and has wholly neglected said estate, and failed to perform his duties as such, and has wasted and mismanaged the property of the estate; that he is now near the age of eighty years, does not speak the English lan-

guage, is now and has been for more than two years last past, most of the time, absent from the county of Los Angeles, wherein the property of said estate is situated, and which requires attention for its proper management; and, by reason of the facts aforesaid, is incompetent properly to act and discharge the duties of his trust.

The petitioner further states that he is the sole heir-at-law of the estate of said Andres Pico, and as such is directly interested in the proper administration thereof; that he is the illegitimate son and child of said Andres, and was by said Andres in his lifetime, in writing by an instrument for that purpose made, as the law provided, duly recognized as his son and heir.

The petitioner then asks that an order be made suspending the powers of Pio Pico as the administrator of said estate until the matters and things charged in the petition can be investigated; that notice be given to Pio Pico, and that he be cited to appear at such time as may be designated, and show cause why his letters of administration should not be revoked; and that on said hearing said letters be revoked, and letters of administration be granted to the petitioner.

On this petition the Court ordered that a citation issue as prayed for to Pio Pico, commanding him to appear in Court on the 21st of July, 1879, and show cause why the prayer of the petition should not be granted.

On the 19th of August, 1879, Pio Pico demurred to this petition on several grounds, and on the same day, without waiving his demurrer, filed an answer to it, in which he denied the allegation of the petition as to his incompetency to discharge the duties of administrator, mismanagement, neglect, etc., and pleaded as an estoppel to the claim of the petitioner for letters of administration a former adjudication.

Notice by posting was given to all parties interested of the hearing on the petition and answer above mentioned. The matters came on to be heard, and on the 25th of October, 1879, the Court removed Pio Pico from the administration, revoked and annulled his letters, and granted letters to the petitioner, Romulo.

By its findings and order the Court found and adjudged that Romulo Pico was the illegitimate child of the intestate, and that the intestate in his lifetime, in writing signed in the presence of a competent witness, duly acknowledged himself to be the father of Romulo, and further adjudged that Romulo was the heir of Andres Pico, deceased, and entitled to letters of administration on his estate. From this order Pio Pico appeals.

As to this adjudication the Court found as follows:

"Shortly after the death of said deceased—to-wit, on the 23d of February, 1876—the said Romulo Pico filed his petition in this Court praying for the issue of letters of administration on said estate to him, and alleging as grounds therefor that he was the son of said deceased. Afterwards—to-wit, on February 25, 1876—the said Pio Pico filed his petition in said Court alleging that he was the brother and one of the heirs of said deceased, and on the 6th day of March, 1876, also filed a written opposition to the issuance of letters to the said Romulo, alleging that he was the sole surviving brother of said deceased, and therefore entitled to letters of administration, and denying that said Romulo was the surviving son of said deceased. Afterwards—to-wit, on the — day of —, 1876—a jury was empaneled to try the said issues between the said Romulo and the said Pio Pico, and on the fourth of April, 1876, the jury returned their verdict, wherein they found, among other things, that the said Romulo was the illegitimate son of the said Andres Pico; that the said Andres did, in his lifetime, publicly acknowledge him, the said Romulo, as his son, and received him as such into his family, and otherwise treated him, the said Romulo, as if he was the legitimate son of said Andres; and further, that on the first day of January, 1873, the said Romulo was not a minor under the age of twenty-one years. The jury also found that the said Andres did not, in his lifetime, in writing, signed in the presence of a competent witness, acknowledge himself to be the father of said Romulo, and also that the said Andres was never married. Afterwards—to-wit, on the twenty-fourth day of July, 1876—an order was made and entered by this Court reciting the said verdict, and directing letters of administration to be issued to the said Romulo on the said estate. Afterwards, said cause having been taken to the Supreme Court of said State on appeal, the said order was reversed and cause remanded by that Court, with directions to this Court to dismiss the petition of said Romulo on the ground that he was not a minor under the age of twenty-one years on the first day of January, 1873, when Section 230 of the Civil Code of said State went into effect, under which the said Romulo alone claimed in the proceedings in this finding mentioned. The petition of the said Romulo was accordingly dismissed, and afterward an order was made by this Court directing letters of administration on said estate to be issued to the said Pio Pico, which was accordingly done on the thirtieth day of October, 1877, as hereinbefore stated in Finding

No. 2. The said petition of said Romulo and the said contest of said Pio Pico of 1876 did not present the same issues as to the right of the said Romulo to letters of administration on said estate, or as to his relationship to said deceased, as are presented by the present petition of said Romulo and the present contest of said Pico. The question whether the said deceased ever in his lifetime, in writing, signed in the presence of a competent witness, acknowledged himself to be the father of said Romulo was not within the issues, and was not determined by any of the aforesaid proceedings of 1876 and 1877."

We are of opinion that this adjudication as found estopped Romulo from making any claim to letters of administration by virtue of his being the son and heir of the deceased intestate. All his rights as such to letters was passed on and decided against him in the proceedings commenced in 1876. Whether he was the legitimate son of Andres Pico, or his illegitimate son and duly adopted and legitimated, was concluded by the order made in that case. His right, if he ever had any, existed in 1876. He had an opportunity of then bringing it forward to be passed on, and whether he did or not he is alike concluded by the judgment rendered in that proceeding. The allegations of the petition in the proceedings of 1876, and the denials thereof as found by the Court (see above finding), put all the matters in issue as to Romulo being a son of Andres, and therefore entitled to letters of administration. All the evidence of whatever character to establish such a fact could have been introduced under the issues of that proceeding. The adjudication in that proceeding is an estoppel in this. (*Garwood vs. Garwood*, 29 Cal. 521; Section 1908, C. C. P.)

But inasmuch as the Court removed Pio Pico from the administration for neglect, mismanagement and incompetency, it had the power, under Section 1365, C. C. P., to grant letters to the petitioner. There is nothing in Section 1379, C. C. P., which deprives the Court of this power.

We do not intend to herein decide anything as to the conclusiveness of the adjudication upon the rights of Romulo on the final distribution.

We have considered the other points discussed on the argument arising on the demurrer of Pio Pico to the petition of Romulo and the appeal of Oxarat, and find no error in the case in relation to them.

We must therefore affirm the order of the Court below, and it is so ordered.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed October 23, 1880.]

No. 7250.

SEXTON, RESPONDENT, vs. SEXTON, APPELLANT.

INSANITY—HEARSAY EVIDENCE—EXPERTS—SOFTENING OF THE BRAIN. Upon a trial involving the question of insanity it is error to admit hearsay testimony that the party had been treated for softening of the brain. Insanity may result from such a disease, but the fact must be shown by experts: *Held*, accordingly, that the answer to a question—"Was Mr. Sexton ever treated for softening of the brain?" "I have no means of knowing; Mr. Sexton had every indication of softening of the brain—so others said"—was inadmissible for several reasons, including the reason that it was hearsay.

Appeal from Superior Court, Santa Barbara County.

B. F. Thomas, for respondent.

Packard and Canfield, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The question being the insanity of the testator, respondent being under examination as a witness, was asked by her counsel:

"Question—Was Mr. Sexton ever treated for softening of the brain?"

"Answer—I have no means of knowing. Mr. Sexton had every indication of softening of the brain—so others said."

Proponent here moved to strike out so much of this answer as referred to what was said by other persons, the same being hearsay, and therefore incompetent. The Court overruled the motion, and to this ruling proponent then and there excepted

"Softening of the brain" is a disease, or an indication of a disease, of a physical organ, from which mental derangement may result. The existence of this disease is a *fact*, which may be proved to the satisfaction of a jury by evidence of "indications" or symptoms to which experts shall testify as indicating or tending to establish the existence of the fact. But whether certain symptoms prove the disease is a matter which can be shown only by medical experts. Whether the "others" who said that testator had "every indication of softening of the brain" were experts capable of expressing an opinion upon that subject does not appear from the testimony of the witness, nor did she state the facts which in her opinion, or that of the others, constituted indications of the presence of the disease.

It is manifest that the testimony objected to was inadmissible for several reasons, including the reason that the evidence was "hearsay."

It is not necessary to consider the other alleged errors.

The order is reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed October 26, 1880.]

No. 6731.

BLACKFORD, RESPONDENT, vs. WHISTLER, APPELLANT.

PRACTICE—NEW TRIAL—FINDINGS—EVIDENCE—STATUTE OF LIMITATIONS.

It is not error to deny a new trial where the evidence sustains the findings. A finding upon the Statute of Limitations is not required where no issue is raised concerning it; but, *held*, that the Court did, substantially, find on such subject.

Appeal from Twentieth District Court, Santa Clara County.

Black & Stephens, for appellant.

Laine, for respondent.

THORNTON, J., delivered the opinion of the Court:

In this action, which was for a partition, defendants answered and also filed a cross-complaint.

The cause came on to be tried on the cross-complaint and the principal action, which were separately tried. Judgment was entered for the partition of the land asked for by plaintiff in his complaint. The cross-complaint was dismissed at the hearing for want of equity. Findings were filed as to the principal action and the cross-complaint. The defendants moved for a new trial, which was denied, and appeals are prosecuted by the defendants from the judgments of the Court for a partition, and on the cross-complaint, and from the order denying the motion for a new trial.

The evidence sustains the findings, and there was no error in denying the motion for a new trial.

It is objected that the Court did not find on all the issues. This position is untenable.

As to the plea of the Statute of Limitations, the complaint and answer taken together show that there was no substantial issue raised by the plea, and the Court did substantially find on it. (See eighth finding in the partition suit.)

We find no error in the record, and the judgment and order are affirmed.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed October 23, 1880.]

No. 6884.

TREADWAY ET AL., APPELLANTS,
VS.
JAMES ET ALS., RESPONDENTS,

NOMINAL DAMAGES—NONSUIT. It is error to grant a nonsuit if plaintiff is entitled to nominal damages.

Appeal from Fifth District Court, San Joaquin County.

Dudley and Wilkes, for appellant.

Budd and Carr, for respondent.

THORNTON, J., delivered the opinion of the Court:

The plaintiffs in this case showed that they were entitled to at least nominal damages. Their cattle, when in a very poor condition, and in a dry season, when there was no food for them, except at a distance, were excluded by the defendants from land where the plaintiffs had a right to have them, from which a cause of action arose, and by which they suffered some damage. The nonsuit was improperly granted, and the judgment and order denying plaintiffs' motion for a new trial are consequently reversed, and the cause remanded for a new trial.

We concur: Sharpstein, J., Myrick, J.

New Law Publications.

A TREATISE ON EQUITY JURISPRUDENCE, as administered in the U. S., adapted for all the States and to the Union, of legal and equitable remedies under the reformed Procedure. By John Norton Pomeroy, LL.D. Three vols. A. L. Bancroft & Co., San Francisco.

Mr. Pomeroy, who is the well-known, respected and learned principal of the Hastings Law College of this city, has published a work on equity jurisprudence, the appearance of which is as well timed as it is ably executed. Since the publication of Story's Equity Jurisprudence, the administration of that branch of legal practice has made such huge strides, and undergone such radical alterations, that the introduction of a well-considered, exhaustive and authoritative treatise on that subject has been greatly needed. This want has been most satisfactorily and admirably

supplied by the above named work—the result of Mr. Pomeroy's labors. That gentleman has brought to his task powers and acquirements well fitted for its successful prosecution. Like the distinguished jurist, Judge Field, to whom the work is appropriately dedicated, Mr. Pomeroy is fairly saturated with judicial erudition, and he deals with his subject with the ease and plasticity of a master mind thoroughly informed on the matters under consideration. The author, in his preface, succinctly refers to the great modifications which the administration of the equity side of the Courts of most, if not all, the States have undergone, especially since the adoption of the Code in New York. He also points out the necessity of reviving and keeping effective some of the doctrines of equitable jurisprudence, which since the introduction of a system of fused law and equity have been allowed to somewhat pass out of sight. Mr. Pomeroy has done his work well—so well that the marks of profound research and keen intelligence are visible on every page. These evidences of care and erudition commends the treatise so thoroughly to the commendation of those best able to judge of its merits that Pomeroy's Jurisprudence will at once become an authority and a necessity in the library of every judge and lawyer. As a text book for students it will be found invaluable, as well in arrangement and clearness of definition as in thoroughness of discussion. The work will be certainly welcomed and at once adopted by the profession, and it is pleasant to note that so important a treatise, so well calculated to become a recognized authority, was issued on this coast. It is a most important and valuable contribution to legal literature. The volumes are printed from handsome clear type, on fine paper, and are well worthy of the eminent house from which they are issued.

ANATOMICAL STUDIES UPON BRAINS OF CRIMINALS.

A contribution to Anthropology, Medicine, Jurisprudence and Psychology by Moriz Benedikt, Professor at Vienna. Translated from the German by E. P. Fowler, M. D., N. Y. Department of Translation New York Medico-Chirurgical Society. Wm. Wood & Co., 29 Great Jones Street, New York, pp. 185.

On the important subject of the rational and humane treatment of criminals undergoing punishment for crime, the above work

offers some suggestions well worthy of thoughtful consideration. The learned author, a surgeon of acknowledged skill, treats the commission of crime not done under the influence of passion as a disease, or caused by congenital malformation of the brain. This theory he supports by the results of the examination of the brains of eleven criminals, in all of which he contends he found well marked congenital deficiencies as compared with a thoroughly symmetrical and fully formed brain. The study in which Benedikt is an enthusiast is gradually gaining the serious attention of those who are seeking to ameliorate the condition of the unfortunate beings who suffer in mind and person owing to the commission of crime. The work has been faithfully translated by E. P. Fowler of New York, illustrated by plates from the original photographs, the plates being produced by the photo-engraving process, thus securing entire exactitude in reproduction (an essential feature in a work of this character). The book is superbly printed on superior paper, and very handsomely bound in cloth.

NORTHWESTERN REPORTER. New series, containing all the decisions of the Supreme Courts of Minnesota, Wisconsin, Iowa, Michigan, Nebraska and Dakota. Homer C. Eller, editor. West Publishing Company, St. Paul, Minn.

In a compact, compendious and inexpensive form the reports of the foregoing Courts are contained in the above publication. The rapid settlement and growing wealth and importance of the northwestern States renders the decisions of the Courts of last resort in those States of special importance. The manner in which the reports of the several States are multiplying makes the burden of supplying the libraries of the practitioner a heavy one, which only the more affluent can support. Any method, therefore, which in a measure reduces the cost of procuring those essential adjuncts to a successful professional practice will be esteemed a boon. This object is accomplished in the above publication. In it will be found the reports of five States and one Territory in a most available, but as compared with the amount of matter, inexpensive form. The style, etc., is all that can be desired. Each volume contains over one thousand pages, printed clearly and handsomely. The series has reached its sixth volume.

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No. 24.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed July 27, 1881.]

No. 10,563.

PEOPLE, RESPONDENT, VS. FUQUA, APPELLANT.

CRIMINAL LAW AND PRACTICE—DEADLY WEAPON—PICK-HANDLE—INSTRUCTION. It appeared that immediately preceding the firing of the fatal shot by defendant, the deceased was approaching toward him with a pick-handle; and upon the trial the Court instructed the jury that if they believed from the evidence that the deceased assaulted defendant with a deadly weapon, they should consider the intent with which such assault was committed; and that if they should find that there was reasonable ground for apprehending that he designed to commit a felony, or do the defendant some great bodily injury, and that there was imminent danger of such design being accomplished, and that defendant acted alone under fear that such design would be accomplished, then they should find the defendant justified in killing the deceased. A juror inquired of the Court what the law termed a deadly weapon. The Court declined to answer: *Held*, error, in view of the instruction and the inquiry of the juror. A deadly weapon is one likely to produce death or great bodily injury. While it is the province of the jury to determine whether a certain weapon was used, its character is ordinarily pronounced by the law. If it becomes a mixed question of law and fact—i. e., when the question whether the weapon used is deadly depends upon the manner in which it was used—the jury are to determine the character of the weapon under appropriate instructions.

Appeal from Superior Court, Napa County.

Henning and Dann, for appellant.

Attorney-General Hart, for respondent.

Ross, J., delivered the opinion of the Court:

The defendant was indicted for the crime of murder, and convicted of murder in the second degree. For the purposes of our decision it is not necessary to detail all of the circumstances of the killing. Suffice it to say that immediately preceding the firing of the fatal shot by defendant, the deceased was advancing towards him with a pick-handle, described by one of the witnesses as being made of hard wood,

from 26 to 30 inches in length, and from $1\frac{1}{4}$ to $1\frac{1}{2}$ inches in diameter at one end, and from $2\frac{1}{4}$ to $2\frac{1}{2}$ inches in width at the other end. The Court instructed the jury, among other things, in substance, that if they believed from the evidence that the deceased assaulted defendant with a deadly weapon, they should consider the intent with which such assault was committed; and that if they should find that there was reasonable ground for apprehending that he designed to commit a felony, or do the defendant some great bodily injury, and that there was imminent danger of such design being accomplished, and that the defendant acted alone under fear that such design would be accomplished, then they should find that defendant was justified in killing the deceased.

After the jury had deliberated on the case for several hours, they were brought into Court at their own request, when the instructions were again read to them, and then the following proceedings occurred:

"A juror—Will the Court please instruct us as to what is termed by law a deadly weapon?"

"The Court—That is a fact the jury must find. Where the instructions speak of the commission of an act, it is for the jury to determine whether the act described was committed or not; it is not for the Court. When the instructions speak of the use of a deadly weapon, it is for the jury to determine whether any weapon was used, what its character was, and whether deadly or otherwise. That is a duty which belongs to the jury, and they cannot shift it on to the Court. That is a fact in the case, and the facts are for the jury alone.

"The juror—I don't want to shift anything. We thought the law plainly stated what these things are.

"The Court—I did not mean to use the term 'shift the responsibility' in any offensive sense, but the law has not invested the Court with any such power; therefore the jury must bear the responsibility which the law places upon them."

There was error in this ruling of the Court, and—in view of the instruction the Court had given the question of justification, and the inquiry on the part of the jury—error prejudicial to the defendant. A deadly weapon is one likely to produce death or great bodily injury. And although whether the weapon used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact for the jury; still, these ascertained, the *character* of the weapon is ordinarily pronounced by the law. There may, however, be cases in which its character—that is to say, whether deadly or otherwise—de-

pend upon the manner in which it was used, and thus becomes a mixed question of law and fact. In cases of the latter kind the character of the weapon must be left to the determination of the jury, under appropriate instructions. (See upon this subject: 1 Bishop's Cr. Law, Sec. 335; *The State vs. Jarrott*, 1 Ire. 97; *The State vs. Collins*, 8 Ire. 407; *Rex vs. Grice*, 7 Car. & P. 803; *State vs. Dineen*, 10 Minn. 407; *State vs. West*, 6 Jones, 505.)

Judgment and order reversed and cause remanded for a new trial.

We concur: McKee, J., McKinstry, J.

IN BANK.

[Filed July 28, 1881.]

No. 6438.

SAN FERNANDO FARM HOMESTEAD ASSOCIATION,
RESPONDENT,
VS.

GEORGE K. PORTER ET AL., APPELLANTS.

PARTITION—GUARDIANSHIP—INFANT—JUDGMENT—NEW TRIAL—NOTICE—PRACTICE. A party intending to move for a new trial must, within ten days after notice of the decision of the Court, when the cause was tried by the Court, file with the clerk and serve upon the adverse party a notice of his intention to make the motion. A judgment entered against an infant is not void if entered with his guardian's consent. The commissioners having made partition in compliance with the interlocutory decree, and the Court having approved the partition so made: *Held*, the guardians of the infants were authorized to consent to the entry of judgment: *Held, further*, the consent of the guardians to the entry of the judgment did not entitle them to notice of the judgment before moving for a new trial.

Appeal from Seventeenth District Court, Los Angeles County.

Widney, Eastman & Graves, for appellants.

Glassell, Chapman & Smiths, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an appeal prosecuted by defendants Porter and Maclay from an order denying their motion for a new trial. The action was partition. We find in the transcript what is called an interlocutory decree in partition, made and entered on the sixth of December, 1870, and a judgment in partition, to which all parties consented, entered on the twenty-fourth of March, 1871. There are some modifications of the

judgment mentioned, the last of which was on the twenty-eighth of May, 1877, and related to the costs of the action. The appellants were not originally parties to the action, but were made so by an order substituting them for certain defendants, entered on the eighth day of August, 1878. The notice of intention to move for a new trial was filed on the ninth day of August, 1878.

Treating the judgment entered in this cause either as interlocutory or final, the motion for a new trial was made too late. The party intending to move for a new trial must, within ten days after notice of the decision of the Court where the cause was tried, as in this case, by the Court, file with the clerk and serve upon the adverse party a notice of his intention to make such motion. (Section 659, C. C. P.) The judgment was valid. It may have been erroneous because entered against infants by consent of the guardians representing them, but it was not void. Under such circumstances it might have been reversed as to the infants on appeal. There is here no appeal from the judgment, and in fact the time for appealing from it had long passed when the notice of the motion for a new trial was given. It is recited in the judgment that the partition made by the commissioners was, as appears from their report, made as directed, and determined by the Court in its interlocutory decree; and this was done without any objection or exception to the report.

It thus appears that the Court passed on the partition made, and approved it. Under such circumstances we think that the guardians of the infants were authorized to consent to the judgment as entered—that is to say, after the Court had passed on the partition made, and approved it. Having thus consented to the judgment as entered, we see no necessity for any notice to them of the judgment, in order to impose on them the obligation to move for a new trial, within the ten days after the judgment, if they could, under the circumstances, prosecute such motion. This obligation to move was not affected by the subsequent modifications of the judgment, since the matters which the moving parties wished to review on their motion for a new trial all occurred before the entry of the judgment in 1871. The same reasoning applies to their right to move prior to the Code of Civil Procedure taking effect in 1873.

We see no error in the ruling of the Court below.

The order is affirmed.

We concur: Sharpstein, J., McKee, J.

I concur in the judgment: McKinstry, J.

(Ross, J., being disqualified, took no part in this decision.)

IN BANK.

[Filed July 29, 1881.]

No. 6794.

AGUIRRE ET AL., APPELLANTS,

VS.

ALEXANDER ET AL., RESPONDENTS.

EJECTMENT—MORTGAGE—TENANTS IN COMMON—COMMUNITY PROPERTY—EVIDENCE—DECLARATIONS—DEED—CONTRADICTORY INSTRUCTIONS—OUSTER—NOTICE—ADVERSE POSSESSION—SPECIAL VERDICT—JURORS MUST TAKE THE LAW AS GIVEN BY THE COURT—CONSTRUCTION OF WRITTEN INSTRUMENTS. A mortgage upon common property, executed by the surviving widow, only affects the undivided interest of the widow. Purchasers under foreclosure of such mortgage only succeed to the widow's interest, and become tenants in common with the heir of the deceased husband. Declarations made by a grantor not contemporaneous with the execution of a deed are hearsay and inadmissible. An act cannot be varied, qualified or explained by declarations which amount to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period. It is error to give contradictory instructions to the jury. A mere adverse holding and claim of title by one tenant in common does not constitute an ouster of his co-tenant. A tenant in common has a right to assume that the possession of his co-tenant is his possession until informed to the contrary, either by express notice or by acts and declarations which may be equivalent to notice. A special verdict controls where the general verdict is inconsistent therewith; and it is error to give judgment in accordance with such general verdict. In such case the latter verdict should be disregarded. Jurors must follow the instructions of the Court as to the law, whether right or wrong; and if not followed, the verdict should be set aside. It is the office of the Judge to instruct the jury in points of law; of the jury to decide on matters of fact. Instructions not pertinent to the issues should not be given, even though, as abstract legal propositions, they are correct. The construction of written instruments is a matter of law for the Court, and not of fact for the jury, unless when the meaning and construction are doubtful, and depend upon extrinsic evidence.

Appeal from Seventeenth District Court, Los Angeles County.

Bicknell & White, for appellants.

Glassell, Chapman & Smiths, Judson and Godfrey & Hutton, for respondents.

McKEE, J., delivered the opinion of the Court:

This case arises out of an action of ejectment brought by the appellants to recover possession of a tract of land in Los Angeles County, known as part of the Rancho San Pedro, which had been granted by the Mexican Government, and for which a patent was issued in December, 1855, by the United States Government, to the grantees therein named.

Plaintiffs in the action are children and heirs-at-law of José Antonio Aguirre, deceased. As such, they claim title to an undivided interest of the land in dispute. Defendants claim to have derived title to the land by mesne conveyances from the purchaser at a mortgage foreclosure sale and sheriff's deed from the surviving widow of the deceased Antonio, under which they severally entered into possession, believing and claiming that they had acquired an absolute title in fee; and it is contended that, under this claim of title, they have been in possession for more than five years before the commencement of the plaintiffs' action, and that the plaintiffs' cause of action, if any they ever had, is barred by the statute of limitations. (Sections 318 and 319 of the Code of Civil Procedure.)

The land in dispute is a tract which embraces portions of two parcels of the Rancho San Pedro, one of which had been allotted to the said José Antonio Aguirre, and the other to one Concepcion Rodriguez, in a judicial partition of the ranch which took place in 1855 between them and the other tenants in common of the ranch. But, subsequently to the allotments and the final decree of partition confirming the same, Aguirre acquired by purchase the parcel which had been allotted and confirmed to Rodriguez. Having thus become the owner of both parcels, Aguirre, on the ninth of June, 1856, conveyed by metes and bounds the parcel which had been allotted and confirmed to him to one Augustin Olvera, by a deed of bargain and sale; and Olvera, on June 30, 1856, by a like deed, conveyed the land, by the same specific description, to the wife of Aguirre and the mother of the plaintiffs. In 1858 Aguirre and his wife conveyed portions of both parcels to one Castillo de Dominguez; and afterwards, in July, 1860, while the title to the remaining portions of the two parcels of the ranch stood partly in the name of his wife and partly in his own name, José Antonio died, leaving his wife surviving him and the plaintiffs as his heirs-at-law.

Administration of his estate followed the death of Aguirre. But pending administration the widow intermarried with one Ferrar, and she and her husband, in 1863, mortgaged to one Temple, of Los Angeles, the land described in the complaint in the action.

The mortgage premises, however, did not include that parcel of the ranch described by metes and bounds in the conveyance by José Antonio to Olvera, and in the conveyance by Olvera to Mrs. Aguirre; and the title acquired by the defendants from her, by and through the foreclosure sale and

sheriff's deed of the mortgage premises, did not attach to that parcel of the land the title to which then stood in the name of Mrs. Ferrar. As surviving widow of the deceased José Antonio, she had a mortgagable interest in both parcels of the ranch; but that interest was only an undivided interest, because, being the common property of the husband and wife, the widow mortgaged only her interest, and the defendants who claim from her acquired no greater interest by their conveyances. They became tenants in common with the plaintiffs of the land in dispute.

But it was contended by the defendants that there had been a mistake in the execution of the deeds by Aguirre to Olvera, and by Olvera to Mrs. Aguirre. In their answer they alleged that "while the father of the plaintiffs was the owner of the tract of land described in the complaint, *and of another tract adjoining it on the south*, he formed the intention of conveying the said tract of land to his wife Rosario Estudillo de Aguirre, and consulted a lawyer as to carrying said intention into effect. Being advised by his said attorney that a direct conveyance to his said wife would be invalid, and that it was necessary, in order to effectuate his said intention, that the title should pass through a third party, on the thirtieth day of June, 1856, with said intention, and no other, he executed a deed to Olvera.

"The real and mutual intention and understanding of the parties to said deed was to convey both of said tracts to the said Olvera; but, by a mutual mistake of said parties, the description by metes and bounds inserted in said deed did not include the land described in the complaint, but only the tract adjoining it on the south; but it was the mutual intent that said description should include the former tract; and the said parties, at the time of its execution, and ever afterwards, believed that it did. In pursuance of said original intention, the said Olvera afterwards executed a deed of conveyance of the land conveyed to him by the said Aguirre to the said Rosario Estudillo de Aguirre. The real and mutual intention of the parties to this deed, also, was the conveyance of both of said tracts; but, by a mutual mistake, there was inserted the same erroneous description, by metes and bounds, that was contained in the deed to Olvera; but it was the mutual intent that the said description should include both tracts, and the said parties, at the time of its execution, and until lately, believed that it did."

Now, in support of the issues made by the pleadings, the defendants, at the trial of the case in the Court below, on the cross-examination of a witness for the plaintiffs, elicited

the following declarations of Aguirre respecting the conveyances made by him to his wife through the medium of Olvera:

"José Antonio Aguirre told me he wanted to leave to his wife and family the land that belonged to him in the Rancho San Pedro. He had two sections—one that I sold him, and the one that he bought from my brother Pedro; and he told me that he wanted to make an arrangement with his wife to make her a deed, so that she would be secured in case of his death. Then one day he came to Los Angeles, and when he returned he told me that he had inquired of a lawyer, who told him he could not make any trade direct with his wife; that he should sell to a third party, and the third party to his wife, and that he was going to do it with Don Augustin Olvera; and he subsequently told me he had made the conveyance to his wife, through Olvera."

These declarations were admitted in evidence against the objections of the plaintiffs, and that is assigned as error.

Aside from the objection that the declarations were not in explanation of any matter to which the witness had testified in his examination-in-chief, we think that the declarations themselves were inadmissible. It is undoubtedly true as a legal proposition, that verbal, as well as written declarations of a party to a transaction, are admissible when they accompany some act, the nature, object or motive of which is the subject of inquiry. (Sec. 1850, C. C. P.) But they must be cotemporaneous with the act to which they were intended to give character. The declarations in evidence did not conform to that rule. They did not grow directly out of the act of José Antonio, in the execution and delivery of his deed to Olvera, for the purpose of conveying the land to his wife; nor does it appear that any of them were made during the continuance of the act, or at, or immediately after, its performance. The first of them appear to have been made at some uncertain time before the making of the deed; the second on a "day when the actor came to Los Angeles," and the third at some time "subsequently" to the act.

The first is not connected with the act, because the form of the act was then unknown to the actor. The second and third were mere isolated conversations, one of which related to the manner of doing the act which he contemplated performing, and the other to the act *after* it had been performed. The exact time when any of them were made does not appear. There is nothing in the testimony from which it can be inferred that any of them were cotemporaneous with the fact under consideration. They can, therefore, be considered

only as mere hearsay. An act cannot be varied, qualified or explained by declarations which amount to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period. (*Nutting vs. Page*, 4 Gray, 584.) It was, therefore, error to overrule the objections to such testimony.

We think the Court also erred in its instructions to the jury. At the request of the plaintiffs' counsel it gave to the jury the following instructions upon the subject of ouster, viz.: "As between tenants in common the statute of limitations does not commence to run until there has been an actual ouster. Nothing short of an actual ouster will sever the unity of possession." And at the request of defendants' counsel the following: "Proof of an actual ouster, that is, a turning out by the shoulders by one tenant in common of another, is not indispensable to commence an adverse possession." The Court also, at the request of plaintiffs' counsel, gave the jury the following instruction on the question of description of the land in deed from Aguirre and wife to Olvera: "Where there is a general description and a specific description by metes and bounds, the latter must prevail;" and at the request of defendants' counsel, the following on the same subject, viz: "Where land in a deed is well described by name, or other general description, and there is added by way of reiteration or affirmation, a particular description by metes and bounds, which is inconsistent with the general description the particular description must be rejected."

These instructions are manifestly contradictory. As was said in *Brown vs. McAllister*, 39 Cal. 573, "they are wholly repugnant, and cannot stand together, and for this reason if there were no other error in the record the judgment must be reversed." Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail; and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, as one or the other must necessarily be where the two are repugnant.

It is urged that these hostile and opposing instructions did not prejudice the plaintiffs, because, as far as the question of ouster was concerned, the facts which established the ouster, were stipulated by the attorneys of the plaintiffs, were proved at the trial of the case, and were specially found by the jury. It was proved at the trial that the defendants had acquired whatever title and interest they had in the land by mesne conveyances from the widow of the ancestor of the plaintiffs; and that they and their grantors had been in pos-

session under their conveyances, claiming title in themselves for a period of twelve years. It was also stipulated by the plaintiffs' attorneys that each of the defendants had acquired his right and title to the land of which he was in possession, in good faith, and for a valuable consideration, and had entered into possession of it at the date of his deed; and that since the date of his entry and deed he had been openly, notoriously and exclusively in the possession of it, cultivating and improving it, within a substantial enclosure, and claiming title to it adversely to the plaintiffs. It was also specially found by the jury that the plaintiffs were children of José Antonio Aguirre, deceased, and Rosario Estudillo de Aguirre, and heirs-at-law of José Antonio Aguirre, deceased—who died in 1860—and were, at the commencement of the action, aged respectively twenty-nine, twenty-six, twenty-two, and twenty years of age; that the defendants, or their grantors, had entered into possession of the lands in dispute at dates ranging between the years 1868, 1869 and 1878; that the land claimed by each defendant had been actually occupied by his grantor in the year 1866; that each one of thirty-two of the defendants had enclosed the particular lot of land which he claimed, and that about twenty-four of the defendants had not made any enclosure; that all the defendants and their grantors had occupied and possessed the land for about twelve years, and that each of them entered under a deed conveying the title of Rosario Estudillo de Aguirre—the widow of José Antonio de Aguirre, deceased, and the mother of the plaintiffs—and "held their possession thereunder"; and that none of the defendants, or any of their grantors, had, at any time, notified the plaintiffs that he ever held, or claimed to hold, any part of the lands adversely to plaintiffs.

Now, during the twelve years in which the defendants or their grantors were in possession of the lands, the plaintiffs were out of possession, but they claimed title to the lands in themselves, as heirs-at-law of José Antonio Aguirre, deceased, and as tenants in common with their mother (Rosario) and her grantees, the defendants in possession. Both plaintiffs and defendants, therefore, claimed from the same source of title. The occupation of the property by the defendants, under their conveyances, was under and in subordination to the legal title claimed by the plaintiffs as tenants in common with the defendants; and the occupancy of each, or of his grantor, under his claim of title, founded upon his conveyance, was not exclusive of the right of the plaintiffs who were tenants in common with him. Such occupation was entirely consistent with the plaintiffs' title, and continued to be

so until those in possession denied the plaintiffs' title, or committed an actual ouster of the plaintiffs. A mere adverse holding and claim of title by those who are tenants in common with others of a tract of land do not of themselves constitute an ouster of a co-tenant. Entry into possession and acts of possession are referable to the community of title. A tenant in common has a right to assume that the possession of his co-tenant is his possession, until informed to the contrary, either by express notice, or by acts and declarations which may be equivalent to notice. (*Miller vs. Myers*, 46 Cal. 535.) But the jury found that none of the defendants, nor any of their grantors, had ever notified the plaintiffs that he held or claimed to hold possession adversely to the plaintiffs; and the only question which remained for the consideration of the jury was whether the evidence as to the character of the possession of each defendant, and the acts and declarations while in possession were of a character to impart notice to the plaintiffs that the possession was adverse; and if so, at what time that knowledge was attributable to the plaintiffs, so that they might determine *when* an actual ouster of the plaintiffs took place. Upon this question the instructions of the Court tended to mislead the jury. We cannot undertake to determine how far the jury may have been influenced by them in finding *when* a disseizin took place, which set the statute of limitations in motion against the plaintiffs.

Besides, upon this question of ouster which was involved in the issue of the statute of limitations, upon which the defendants relied as a bar to the action, both the jury and the Court disregarded the special verdict; for the jury specially found that some of the defendants did not actually oust the plaintiffs until 1873; others did not until 1874, and others did not until 1876. The action was commenced in 1878, so that the statute of limitation did not run, from the date of the ouster, as found by the jury, in favor of those of the defendants, at least, who ousted the plaintiffs in 1874 and 1876; and the plaintiffs were entitled to a verdict against them. Yet the jury returned a general verdict for them.

As a conclusion of law from the special verdict this general verdict was unwarranted. It was inconsistent with the special verdict, and the Court should have disregarded it, and given judgment for the plaintiffs upon the special verdict against those of the defendants in whose favor the statute of limitation had not run. This it did not do, and the judgment which it rendered in favor of those defendants was erroneous.

Moreover, there was no conflict of evidence upon the ques-

tion of the respective ages of the plaintiffs at the commencement of the action—one of them was a minor, under the age of twenty-one years, and another, one year older than the age of majority—and the jury so specially found. As the law of these facts the Court gave the jury the following instructions, namely: "The statute of limitations does not run against a male until he has reached twenty-one years of age, nor against a female until she has attained eighteen years of age. This statute, therefore, has not commenced to run against said Martin Aguirre, he being a minor, and cannot have been in operation against the other plaintiffs for a longer period than the time which has elapsed since they attained their majority; but in no event can the statute of limitations have been in operation against the plaintiffs unless they have been actually ousted in the manner already described, and then only from such ouster."

It is evident that the jury entirely disregarded this instruction, for they returned a general verdict against the plaintiffs. But it is said that the verdict is right and the instruction was wrong, because the statute of limitation runs against a minor as well as against an adult. Whether the rights of minors are barred equally with those of adults is a question which cannot, under the circumstances, be determined. The fact with which we have to deal is that the jury by their verdict disregarded the instruction of the Court, and, for that reason alone, it was the duty of the Court to set aside the verdict whether the instruction was right or wrong. *Emerson vs. Santa Clara County*, 40 Cal. 543; *ad questionem facti non respondent iudices; ad questionem legis non respondent juratores*.

At the request of defendants' counsel, the Court also gave to the jury some nine or ten instructions upon the question of the construction of written instruments. These, as abstract legal propositions, were in the main correct; but they were not pertinent to any issues of fact to be found by the jury, and for that reason they should not have been given. There is no rule of law better established than that the construction of written instruments is a matter of law for the Court, and not of fact for the jury, unless when the meaning and construction are doubtful and depend upon extrinsic evidence. But there was no evidence in the case which required the jury to pass upon the question, for the Court had construed the only deed in evidence in the case about which there was any controversy, by telling them that "the deed conveyed only the premises therein specifically described; and that those who claimed under the deed had acquired no

greater rights thereby than such as had been acquired by the grantee in that deed." In thus instructing them, the Court gave the proper construction to the description of the property conveyed by the deed, and the jury were bound to accept it as the law of the question. There was, therefore, no question before them about which the instructions given them in relation to the construction of written instruments were in any respects applicable.

Order reversed and cause remanded for a new trial.

I concur in the order of reversal: Morrison, C. J., Thornton, J.

CONCURRING OPINION.

I concur with the judgment. The jury brought in a general verdict for defendants, and also passed upon certain questions submitted to them by order of the Court. If the special findings clearly indicated the purpose of the jury to decide that, more than five years before the commencement of the action, all or any of the defendants—or their predecessors—had ousted plaintiffs Miguel Aguirre and Dolores Aguirre, from the whole or from specific portions of the several tracts of land described in the answers of the respective defendants, and had continued in the actual and adverse possession, from such ouster, for five years or more after plaintiffs Miguel and Dolores were of full age, my views of the case would be modified. I should then be inclined to hold that, as to those plaintiffs and with respect to such tracts, the order denying the new trial was proper. I should so hold, whatever the errors of the trial Court in giving to the jury its interpretation of the deed from José Antonio Aguirre and wife to Olvera; since it would then have appeared that such errors could not have injured the particular plaintiffs, Miguel Aguirre and Dolores Aguirre, against whom the statute of limitations had run when the complaint was filed herein.

But it cannot be disputed that the special findings leave very great doubt as to the facts which the jury thereby intended to find. So far as they bear on the question of ouster and adverse possession, they are confused, uncertain, and not such as an adjudication of the rights of the parties may safely be based upon.

If, therefore, the errors committed by the Court below are such as demand a new trial as to any, they require a new trial as to all of the parties to this action.

At the request of plaintiffs, the Court below charged the jury: "In a deed of conveyance where there is a general

description and a specific description by metes and bounds, the latter must prevail; therefore the deed from José Antonio Aguirre and his wife Rosario Estudillo de Aguirre to Augustin Olvera conveyed only the premises therein specifically described, and those who claim under said deed have acquired no greater rights thereby than such as were so acquired by said Olvera."

On request by defendants, the Court instructed the jury: "Where land in a deed is well described by name, or other general description, and there is added, by way of reiteration or affirmation, a particular description by metes and bounds which is inconsistent with the general description, the particular description must be rejected."

It is not necessary to determine how far the question whether the particular description was added "by way of reiteration or affirmation," was a question of *fact* to be passed upon by the jury.

By the instruction last cited, the jury were, in effect, told that they were authorized to determine whether the land "was well described by name, or other general description," and to decide whether such general description controlled. For aught that appears, the jury did find that all the land within the general description passed by the deed.

Yet the jury had already been instructed that the specific description, by metes and bounds, must prevail, and that the deed conveyed only the premises so specifically described.

The two instructions were contradictory.

McKinstry, J.

I think that the instructions as to which description should prevail are contradictory, and that for that reason the order denying the motion for a new trial should be reversed.

Sharpstein, J.

DISSENTING OPINION.

The premises in controversy form a part of the San Pedro Rancho, situated in Los Angeles County. In an action brought in the District Court of that county for the partition of the rancho—in which action all of the owners were made parties—an interlocutory decree was entered in the year 1855, by which it was, among other things, decreed that José Antonio Aguirre and Concepcion Rocha de Rodriguez each owned a certain undivided interest therein. Referees were appointed to make the partition in accordance with the interlocutory decree. Subsequent to the interlocutory decree,

but before the entry of the final decree—that is to say, on the eighteenth of September, 1855—Concepcion Rocha de Rodriguez conveyed by deed all of her interest in the rancho to Manuel Dominguez, who (also prior to the entry of the final decree) sold the same to José Antonio Aguirre—the deed for which, however, he did not execute to Aguirre until December 27, 1855. The final decree was entered on the fourteenth of the same month. The referees caused a survey and map of the rancho and of the respective allotments to be made, and in making the division allotted to José Antonio Aguirre one tract of land, in lieu both of the interest he originally had and of the interest he acquired from Concepcion Rocha de Rodriguez through Dominguez. On the map of the partition is set down the respective allotments of the various owners, each of which is surrounded by a differently colored line, and with the name of the party or parties to whom it is awarded written thereon. The allotment in question in this case is surrounded by red lines, but running through it in an easterly and westerly direction, is a black line. On the tract surrounded by the red lines, and extending across the black line, is written the name “José Antonio Aguirre;” and on that portion of the tract surrounded by the red lines lying north of the black line is written the name of “Concepcion Rocha de Rodriguez.” On the margin of the map is a table of the courses and distances of each allotment. Those referring to the allotment in question commence at Station No. 1, and follow the red lines in the order of the stations, thus inclosing the whole tract; and at the bottom of the tabling the area of the whole tract is given thus: “Area 10,405½.” No courses or distances are given of the black line, and the surveyor who made the survey and map testified that this line was not run on the ground, but that he drew it on the map, through the red-line tract, for the purpose of showing the portion awarded to Aguirre by virtue of his original ownership and the portion he acquired through Concepcion Rocha de Rodriguez; and, further: “It was at the request of Aguirre and his attorney, Mr. Brent, that I treated the Concepcion Rocha tract as it is. At the time I made the survey this was considered Aguirre’s land, and I was instructed to put it all in one lot and not run the division line, because it all belonged to one.”

After the conveyance by Concepcion Rocha de Rodriguez, the action was continued in her name, by virtue of Section 385 of the Code of Civil Procedure, for the benefit of her successor in interest; and by the final decree that portion of

the red-line tract situated south of the black line was awarded to Aguirre in his own name, and that portion of said tract lying north of the black line was awarded to him in the name of Concepcion Rocha de Rodriguez, in whose name, as already said, the action had been continued. Subsequently—to wit, on the 9th of June, 1856—Aguirre executed to Augustin Olvera the deed under which the defendants claim. If this deed conveyed to Olvera the land in controversy, then it is not pretended that the plaintiffs have any title, for they claim only as heirs of Aguirre. And that the deed *did* convey all of the disputed premises, appears from the record to have been supposed by the original grantor and all other parties in interest, until May, 1877, when the guardian of the minor plaintiffs discovered a “flaw in the title.” In the meantime a large number of persons (defendants here) had bought distinct parcels of the tract, and built up valuable improvements thereon. A few days after the conveyance from Aguirre to Olvera, the latter conveyed the same property to Rosaria Estudillo de Aguirre, wife of José Antonio Aguirre. The conveyance by Aguirre to Olvera, and by Olvera to the wife of Aguirre, was adopted by the parties as a means of vesting the property in Aguirre’s wife. The witness Manuel Dominguez, in speaking of this circumstance, said: “José Antonio Aguirre told me he wanted to leave to his wife and family the land that belonged to him in the Rancho San Pedro. He had two sections, one that I sold him, and the one that he bought from my brother Pedro, and he told me that he wanted to make an arrangement with his wife to make her a deed so that she would be secured in the case of his death. Then one day he came to Los Angeles, and when he returned he told me that he had inquired of a lawyer, who told him he could not make any trade direct with his wife; that he should sell to a third party, and the third party to his wife, and that he was going to do it with Don Augustin Olvera, and he subsequently told me he had made the conveyance to his wife, through Olvera.”

Whatever interest was acquired by the wife of Aguirre by the deed from Olvera is vested in the defendants; and as this interest is precisely the same as that conveyed to Olvera by the deed from José Antonio Aguirre, the question is, as already said, What is the true interpretation of the last mentioned deed?—the description in which is as follows:

“A certain tract or parcel of land situated in the county of Los Angeles, and said tract or parcel aforesaid being a part of the land known by the name of the Rancho of San Pedro or Los Dominguez, and which piece of land is the

same that belonged to José Antonio Aguirre, party of the first part, and which he has in his possession under a partition that was made of said land of the Rancho of San Pedro in December, 1855, as is set forth by a final decree in the matter of the District Court of the First Judicial District of the State of California, dated December 14, 1855, entered in the Book of Judgments of said Court, and in conformity to the survey and map drawn of all the land aforesaid, by which is shown the portion and situation of land that belonged to each of the parties interested in said Rancho de San Pedro, and which survey and map drawn was executed by George Hansen, Deputy County Surveyor of the county of Los Angeles, and the portion of land which belonged to said José Antonio Aguirre, party of the first part, being bounded and described as follows, to wit: Commencing at a stone in the summit of a hill the line of the northern exterior boundary of said rancho, being the tenth station on said map; thence running toward the northeast in a direct line to the point known as the old house, including the same; thence in a line, course east, to the River San Gabriel; thence down the mid-channel of said river to the north line in the boundary of Maria de Jesus Dominguez; thence following the northwest boundary of said Maria de Jesus and the north boundary of the said Manuel Dominguez to the point of beginning."

The last call in the deed—namely, the description by metes and bounds—only embraces that portion of the tract included within the red lines, and awarded to Jose Antonio Aguirre in the partition, which is situated south of the black line; and it is insisted on the part of the appellants that this specific description controls the other calls of the deed. On the other hand, it is urged for the defendants that the deed contains five calls, viz.: First, the land "that belonged to José Antonio Aguirre, and which he has in his possession under a partition made of the Rancho of San Pedro in December, 1855;" second, "as is set forth by a final decree in the matter * * * entered in the Book of Judgments of said Court;" third, "and in conformity to the survey and map drawn of all the land aforesaid, by which is shown the portion and situation of land that belonged to each of the parties interested in said Rancho de San Pedro, and which survey and map drawn, was executed by George Hansen, Deputy County Surveyor," etc.; fourth, "the portion of land which belonged to José Antonio Aguirre;" and fifth, the description by metes and bounds. And that the latter—to wit, the description by metes and bounds—was not intend-

ed to be used in the sense of restriction, but in the sense of reiteration or affirmation, and that in so far as it is erroneous or defective it must be rejected as false. In this I agree with the counsel for the defendants. The land which belonged to Aguirre, under the partition of the rancho, was the red-line tract, which included the premises in controversy, and the partition survey and map of the rancho showed this tract to have been allotted to him. All of the calls of the deed, therefore, except the description by metes and bounds, clearly enough refer to and describe the whole of the red-line tract, while the description by metes and bounds includes only a part of it.

In all cases of this character the paramount object is to ascertain and give effect to the intention of the parties, and this intention is to be gathered from the entire instrument. In *Peck vs. Mallams*, 10 N. Y. 532, the Court of Appeals said: "The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated. To this end parts of the description may be rejected, though upon the face of the deed they seem as material as the parts which are left. This only is requisite, that after subjecting the description to every modification, which the actual condition of the premises may require, there must be left some substantial designation of the thing to be conveyed, so that the Court can see, looking at the property in the condition in which it was at the time of the deed, that the description can be fitted to it, and was intended by the parties to relate to it." (See, also, *Cholmondeley vs. Clinton*, 2 Jac. & W. 134; *Worthington vs. Hyllyer*, 4 Mass. 196; 3 Wash. on Real Prop., p. 333 *et seq.*; *Stanley vs. Green*, 12 Cal. 148; *Piper vs. True*, 36 Cal. 606; *Haley vs. Amestoy*, 44 Cal. 132.) In the last case cited the deed first described the premises by name, and then gave a particular description by metes and bounds, which only included a part of the land embraced in the first description; and this Court, taking in view all of the facts and circumstances surrounding the execution of the deed, held that "the particular description was not intended to be used in the sense of restriction, but in the sense of reiteration or affirmation, and that in so far as it was erroneous or defective it must be rejected as false."

It is not claimed that the testimony of Dominguez was admissible for the purpose of varying or contradicting the terms of the written conveyance, and it is very clear that it could not be received for that purpose. It was admissible, how-

ever, for the purpose of showing the true consideration of the deeds from Aguirre to Olvera and Olvera to Mrs. Aguirre, and also for the purpose of placing the Court in the position of the parties in order that it might rightly interpret the language employed. In his work on Evidence, Mr. Greenleaf, after saying that there is no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties, declares: "The object in both cases is the same—namely, to discover the intention. And to do this, the Court may, in either case, put themselves in the place of the party, and then see how the terms of the instrument affect the property or subject-matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument. * * * It is only in this mode that parol evidence is admissible (as is sometimes, but not very accurately said), to explain written instruments, namely, by showing the situation of the party in all his relations to persons and things around him, or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, * * * to several monuments or boundaries, * * * or the terms be vague and general, or have divers meanings * * *; in all these and the like cases, parol evidence is admissible of any extrinsic circumstance tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect; and this, without any infringement of the rule, which, as we have seen, only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself." (1 Greenleaf on Ev., Secs. 287 and 288; Id. Sec. 169.)

In the case at bar the deed itself contains several descriptive calls, all of which, except one, include the premises in controversy; and the main question is, Which of those contradictory calls express the intention of the grantor? Applying the principles to which allusion has been made, and reading the deed in the light of the circumstances surrounding its execution, I think it manifest that the intention was to convey to Mrs. Aguirre all of the land embraced within what (for convenience of reference) has been designated as the red-line tract. This construction is strengthened by the further circumstance that after the execution of the deed no claim appears to have been asserted by Aguirre to any part of the premises during the remainder of his life, nor, after his death, by any of his heirs until May, 1877—a period of

more than twenty years—when the supposed “flaw in the title” was discovered by the guardian of the then minor children, and years after all of the interest of Mrs. Aguirre had passed into the hands of a large number of people, who bought at various times distinct parcels of the tract upon the supposition that by the deed she acquired the entire tract, and who, since the dates of their respective purchases, have held adverse possession of the whole of their respective parcels and have made their homes there.

The deed in question having, in my opinion, conveyed the entire tract embraced within the red lines, it results that the plaintiffs have no title to any part of it, and that they could not, therefore, possibly recover in the action. That being the case, it is not necessary to consider the instructions given by the Court below to the jury, since, even if erroneous, they could not have prejudiced the plaintiffs. (*Green vs. Ophir C. S. & G. M. Co.*, 45 Cal. 527; *Larco vs. Casanueva*, 30 Cal. 561; *Hebrard vs. Jefferson G. & S. M. Co.*, 33 Cal. 290.)

For these reasons the judgment and order of the Court below should, in my opinion, be affirmed. I therefore dissent from the judgment here.

Ross, J.

I concur with Mr. Justice Ross: Myrick, J.

Opinion Previously Omitted.

DEPARTMENT No. 2.

[Filed October 25, 1880.]

No. 7402.

THOMPSON, APPELLANT, VS. MILLER, RESPONDENT.

ATTACHMENT—SHERIFF—SURETY—ACTION. A sheriff is not responsible to the surety upon a promissory note for a failure to levy an attachment, in an action brought upon the note by the holder.

Appeal from Superior Court, Ventura County.

Blackstock & Sheppard, for appellant.

Williams & Williams, for respondent.

By the COURT:

In this action we cannot see that the defendant owed any duty as Sheriff to the plaintiff herein in regard to the levy of the writ of attachment counted on in the complaint. The demurrer to the complaint was properly sustained, and the judgment is affirmed.

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No. 25.

Supreme Court of California.

IN BANK.

[Filed July 28, 1881.]

No. 6521.

KNOX, APPELLANT,

VS.

BOARD OF SUPERVISORS OF LOS ANGELES
COUNTY, RESPONDENT.

STATUTORY CONSTRUCTION—SUPERINTENDENT OF IRRIGATION FOR LOS ANGELES COUNTY—COUNTY OFFICER—CONSTITUTIONAL LAW. The Superintendent of Irrigation mentioned in the Act of March 10, 1874—"An Act to promote irrigation in the county of Los Angeles"—(Stats. 1873-4, p. 312), was not a county officer. Such superintendent was an officer of such portions only of the county as were formed into irrigation districts, and was to be paid out of water rates collected from such districts.

Per **McKINSTRY, J.** The above Act, and the Act of March 7, 1878, "For the relief of George C. Knox" (Stats. 1877-8, p. 181.) conflict with Article XI, Sections 4 and 13, and Article I, Section 11, of the Constitution of 1849.

Appeal from Twenty-third District Court, San Francisco.

Barham, Hutton & Godfrey, for appellant.

Thom & Ross, for respondent.

MYRICK, J., delivered the opinion of the Court:

It appears, by reference to the Act of March 10, 1874, that the functions of the office of Superintendent of Irrigation were to be exercised in portions only of the county—that districts were to be created upon a request of a majority of the property-owners within the proposed districts—such districts to bear all the expenses, by water rates and by taxes levied upon the lands within the respective districts—and that at

least one portion of the county, viz., the city of Los Angeles, was entirely exempted from the operation of the act. The Superintendent may have been *called* a county officer, but he was not such in fact. He was an officer of a portion or portions only of the county, *i. e.*, such only of the county as should be formed into irrigation districts. The act creating the office did not pretend that he was to be paid as a county officer from taxes levied upon the county at large; he was to be paid out of the water rates collected from persons supplied with water. Being an officer of districts only, his compensation should be limited to revenue derived from such districts. (*The People ex rel. Long vs. Townsend*, No. 6497, opinion filed Dec. 28, 1880.)

Judgment affirmed.

I concur: Morrison, J.

CONCURRING OPINION.

I agree to the opinion of Mr. Justice Myrick. With respect to other questions suggested by the record, I do not deem it advisable now to express any views *in extenso*. I desire to add, however, that even if the act "to promote irrigation in the county of Los Angeles" could be construed as adding to the powers and governmental machinery of the county of Los Angeles, and the "Superintendent of Irrigation" could be considered a *county officer*, still the two acts—"To promote irrigation," etc., and that of March 7, 1878, "For the relief of George C. Knox"—would, in my opinion, conflict with the provisions of the Constitution of 1849, following: "The Legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the State"—(Art. XI, Sec. 4); "All laws of a general nature shall have a uniform operation"—(Art. I, Sec. 11); "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county, and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated"—(Art. XI, Sec. 13): McKinstry, J.

I concur in the affirmance of the judgment: Sharpstein, J.

I dissent: Thornton, J.

(Ross, J., being disqualified, took no part in the decision of this cause.)

DEPARTMENT No. 1.

[Filed July 27, 1881.]

No. 7486.

VEERKAMP, RESPONDENT.

VS.

THE HURLBURT CANNING AND DRYING
COMPANY, APPELLANT.

CONTRACT—CONDITION PRECEDENT—FRUIT DELIVERY. By the terms of a contract defendant engaged to take and pay for all the fruit raised by plaintiff, at a uniform rate per pound for all raised and delivered at the works of defendant, plaintiff engaging to deliver the fruit in good condition and when in suitable ripeness: *Held*, the delivery of all the fruit referred to in the contract was not a condition precedent to plaintiff's right to recover any money, but that for each lot furnished and accepted by defendant, plaintiff was entitled to receive its value at the rate per pound fixed in the contract.

Appeal from Superior Court, El Dorado County.

George C. Blanchard, for appellant.

G. J. Carpenter, for respondent.

Ross, J., delivered the opinion of the Court:

The parties to this suit contracted with each other in writing as follows: "The said company engage to take and pay for all the fruit raised by the said Francis Veerkamp at the uniform rate of five-eighths ($\frac{5}{8}$) of a cent per pound for all fruit raised and delivered at the works of the above company, in Upper Placerville (excepting Mission grapes), and to furnish boxes for picking and hauling the fruit. The said Francis Veerkamp, on his part, engages to deliver the fruit in good condition and when in suitable ripeness, and will sell no fruit to other parties, excepting one load early."

The parties could not very well have made their contract more indefinite. The fruit referred to in the written agreement was such as was then growing on land of the plaintiff. As the fruit ripened the plaintiff delivered and the defendant received it under the contract. After a part had been thus delivered and accepted, the plaintiff demanded of defendant payment for that delivered at the agreed rate, but the defendant refused to make such payment until the plaintiff should first deliver all of the fruit referred to. Thereupon plaintiff declined to deliver to defendant any more, and sued for the value of that delivered and accepted. The defendant resists the action on the ground that the delivery of all of the fruit referred to in the contract was a condition precedent to the

payment for any. We do not think that the proper construction of the agreement between the parties. The contract must be constructed with reference to the subject-matter of it. It was executory in its nature. It could not be known in advance how much of any particular kind of fruit there would be. In the nature of things it ripened at different times, and had to be delivered at different times. The contract fixed the rate per pound at which the defendant was to pay for it, and, in our opinion, according to its true construction, as each lot was delivered to and accepted by defendant there became due and payable from it to the plaintiff the value thereof at the rate per pound fixed in the contract.

Judgment affirmed.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed June 28, 1881.]

No. 10,579.

THE PEOPLE, RESPONDENT, vs. SING LUM, APPELLANT.

CRIMINAL PRACTICE—APPEAL—JUDGMENT—TRANSCRIPT—INSTRUCTIONS—NEW TRIAL. Upon an appeal from a judgment the transcript must contain a copy of the judgment, else the appeal will be dismissed. If the evidence is not brought up and the exception is to the charge as an entirety, and no error is pointed out by appellant nor discovered by the Court, the order denying motion for a new trial will be affirmed.

Appeal from Superior Court, San Francisco.

W. A. Nygh, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The appeal is from a judgment of conviction and from an order denying defendant's motion for a new trial. The transcript does not contain the judgment from which the appeal purports to be taken. The appeal from the judgment cannot therefore be entertained. The bill of exceptions does not contain any of the evidence given at the trial. The charge of the Court to the jury only is given, with an exception noted to the charge as an entirety. No objection to the charge is urged in the brief which has been filed for the appellant, and we fail to discover any error in it.

Appeal from the judgment dismissed, and order denying the defendant's motion for a new trial affirmed.

IN BANK.

[Filed July 29, 1881.]

No. 7153.

ROSENBERG ET AL., VS. FRANK ET AL.

DISTRIBUTION—EQUITY—PROBATE COURT—PRO RATA—RESIDUARY CLAUSE—JURISDICTION—REESE WILL. Testator bequeathed to his three sisters, E. F., H. B., and H. R. (all of the whole blood), \$100,000 each; to his two sisters, T. W. and L. O. (of the half blood), \$50,000 each; to J. R., in trust for his three nieces, H. G., C. M., and R. F. (daughters of M. F., a deceased sister of the whole blood), \$150,000. After bequests to other parties the will provided: If there is any surplus after paying my legacies and debts, the balance to be divided, *pro rata*, between my sisters, E. F., H. R., H. R., and T. W., L. C., and the children of M. F., deceased, namely, H. G., C. M., and R. F. *Held*, that the words *pro rata* should read "*pro rata*;" that the amounts of the bequests furnished the standard of proportioning the residuary estate; that it was to be divided into eleven parts; the three sisters of the whole blood taking two-elevenths each (6-11); the two sisters of the half blood one-eleventh each (2-11); and the three nieces one-eleventh each (3-11). After a will has been probated and before the estate has been distributed, a Court of equity has jurisdiction to construe its terms; and the Probate Court has not exclusive jurisdiction of the subject matter.

Appeal from Superior Court, San Francisco.

McAllister & Bergin and Jarboe & Harrison and H. S. Monroe, for appellants.

Cope & Boyd and Wilson & Wilson, for respondents.

THORNTON, J., delivered the opinion of the Court:

Michael Reese died on the 2d of August, 1878, leaving a last will and testament, of which the following is a copy:

"I Michael Reese being of sound mind, and memory, do make, ordain, publish and declare this to be my last will and testament, the whole written with my own hand. I direct all my just debts to be paid with as little delay as possible. I direct the rest of my property to be converted into cash within five years after my death by my executors hereinafter named, and to be divided as follows. To my sisters Eliese Frank, Henerietta Rosenfeld, Hanna Rosenberg, all of the City Chicago, State of Illinois one hundred thousand dollars *each* to my sisters Therese Weinman, and Lena Cohn of the same place aforesaid fifty thousand dollars each. To Jakob Rosenberg of the City of Chicago State of Illinois in trust for Hanah Goldsmith Carry Manheimer, and Rosa Fuller one hundred and fifty thousand dollars. To Joseph Frank and H. L. Frank my nephews sixty thousand dollars

or thirty thousand to each and I direct that forty thousand dollars owing by them to me be marked paid and cancelled. To my niece Nancy Frank daughter of my sister Eliese Frank twenty five thousand dollars To H. L. Frank in trust for his sister Mina Friedlander and her children twenty five thousand dollars. To Regina Goodman of the City of New York widow of H. Goodman deceased ten thousand dollar—To Dr. John N. Eikel in trust for his son Charles Eikel five thousand dollars. To Caroline Greeneberg, wife of Leopold Greeneberg of this city twenty five hundred dollars. To Leonardt Weglehuer, at present in my employment twenty five hundred dollars. To the Pacific Hebrew Orphan Asylum and Home Society twenty thousand dollars. To the Saint Lukes Hospital also of this city ten thousand dollars. To the Mount Sinai Hospital of the City of New York twenty five thousand dollars To the Hebrew Orphan Asylum of the City of New York twenty five thousand dollars. I give and devise to the Corporation known as the Regents of the University of California Fifty thousand dollars to be by them invested in the founding and maintaining a Library to be known and called the Reese Library of the University of California. To Jakob Rosenberg and my dear sister Henerietta Rosenfeld of the City Chicago State of Illinois two hundred thousand dollars (\$200,000) in trust to be disbursed by them in such charities as they may think fit. I would recomend to them that a part of the above named amount should be disbursed amongst my first cousins living in *Bavaria* Germany, and any other country where they may reside provided they are poor and needy, and part of the same should be invested in some charity, regardless of Creed in my birthplace Hainsfurth Kinkdom Bavaria Germany. I schall leave this to their own judgment and discretion to *disburse it*. Wisching to schow my extreme regard for my Friend Mrs. R. C. Johnson, of this city, who positively refuses to be one of my legatees, I leave in trust to her for certain favorite charities for instance A Home, or Asylum for aged people regardless of Creed, and the San Francisco Foundling and lying in Hospital, thirty thousand dollars to be disbursed by her for the above named charities. I, desire that my Executers hereinafter named schall aid and advise her, and render her all assistance. To the Eureka Benevolent Society of this City twenty thousand dollars. To the German Hospital of this city ten thousand dollars. To my Nephews H. L. Frank and Joseph Frank in trust for a Orphan Asylum in Cleveland Ohio and other charities in Chicago which I, omitted. Fifty thousand dollars which

they can use and disburse as they may think fit. If there is any surplus after paying my Legacies and Debts the Balance to be divided pro rata between my sisters Eliese Frank, Henerietta Rosenfeld, Hana Rosenberg and Therese Weinman. Lena Cohn and the children of Mary Fuller deceased namely, Hana Goldsmith Carry Manheimer and Rosa Fuller,—I, appoint as my executors Charles Lux and Joseph Rosenberg of this city and Jakob Rosenberg of the city of Chicago State of Illinois and I, direct that no bonds be required of them or either of them. In witness whereof I, have hereunto set my Hand in the presence of three Witnesses whom I, requested to act as subscribing hereto and in their presence and in the presence of each of them I, have declared this to be my last will and testament on this fourteenth day of March in the year one thousand eight hundred and seventy eight.

MICHAEL REESE.

“On this fourteenth day of March A. D. eighteen hundred and seventy-eight we, the undersigned, all residing in the city of San Francisco, State of California, have hereunto set our hands as subscribing witnesses to this the last will and testament of Michael Reese, at the request of said Reese in his presence and in the presence of each of us.

“WILLIAM ALVORD,

“H. M. NEWHALL,

“G. PALACHE.”

On the fifth of September, 1878, this paper was duly admitted to probate as the last will and testament of the decedent Reese, by the Probate Court of the County of San Mateo. The plaintiffs were by the same Court appointed executors of the said will; letters testamentary were issued to them, and they qualified and entered upon the discharge of their duties as such executors.

The executors bring this action to obtain a construction of the will.

It will be perceived on a perusal of the will, which is autographic, that the testator after a direction that all his just debts shall be paid with as little delay as possible and that the rest of his property shall be converted into cash by his executors within five years after his death, proceeds to give direction as to the division of the proceeds. The first bequests are as follows:

“To my sisters Eliese Frank, Henerietta Rosenfeld, Hanna Rosenberg, all of the City of Chicago, State of Illinois, one hundred thousand dollars each, to my sisters Therese Weinman and Lena Cohn of same place aforesaid fifty thousand dollars each. To Jakob Rosenberg of the City

of Chicago, State of Illinois, in trust for Hanah Goldsmith, Carry Manheimer and Rosa Fuller, one hundred and fifty thousand dollars."

Several bequests follow, expressed in seventeen different clauses, after which the testator thus disposes of the residuum of his estate: "If there is any surplus after paying my legacies and debts the balance to be divided *pro rato* between my sisters Eliese Frank, Henerietta Rosenfeld, Hanna Rosenberg and Therese Weinman, Lena Cohn and the children of Mary Fuller, deceased, namely, Hanna Goldsmith, Carry Manheimer and Rosa Fuller."

The construction of the residuary clause just above quoted is asked in the complaint in this action..

It is contended on behalf of Eliese Frank, Henerietta Rosenfeld and Hannah Rosenberg, who are sisters of the whole blood, that according to the true meaning of this residuary clause, the residuum is to be distributed under it between the several legatees therein named, in the same proportion as the special pecuniary legacies are given to them in the clause of the will first above quoted herein, and that they are each entitled to two-elevenths and the others one-eleventh each.

Therese Weinman and Lena Cohn, who are sisters of the half blood, contend that the residuum is to be divided into six shares, the sisters to take one share each, and the children of Mary Fuller, deceased, one-sixth or one share between them.

Hannah Goldsmith, Carrie Manheimer and Rosa Fuller, who are nieces, children of a sister of the whole blood, urge and claim that the residuary estate is to be divided equally between the legatees named in the residuary clause, share and share alike.

The decision of the Court below was as follows:

"First—The said Michael Reese made, published and declared his last will and testament in manner and form set out in the complaint in this action. The will was an olographic will. A true and correct photographic copy thereof is hereto annexed, marked Exhibit 'A,' and made a part hereof.

"Second—Said last will and testament was duly admitted to probate, and letters testamentary issued to the plaintiffs, as is averred in the complaint.

"Third—That said defendants Eliese Frank, Henrietta Rosenfeld and Hannah Rosenberg, were sisters of the whole blood of said Michael Reese, deceased.

"Fourth—That said defendants Therese Weinman and

Lena Kohn were sisters of the half blood of said Michael Reese, deceased, having the same father as said Reese, but not the same mother.

"Fifth—That the mother of said Therese Weinman and Lena Kohn was second wife of the father of said Reese, and was still living at the time of the decease of said Reese:

"Sixth—That said Hannah Goldsmith, Carrie Manheimer and Rosa Fuller were nieces of said Reese, being daughters of his sister of the whole blood, Mary Fuller, who died prior to the death of said Reese, and prior to the making of said will.

"Seventh—Said Reese was a native of the Kingdom of Bavaria, and came to the United States when about twenty years of age; came to California in 1850, and remained here, with the exception of a few brief visits in the East; died at the age of sixty-four years, and never had been married.

"Eighth—He was a shrewd man of business, and managed his own affairs himself; his current business during the latter part of his life embraced millions of dollars yearly. He largely borrowed and loaned money; dealt in bonds, stocks, and other securities, and also in real estate, and engaged in other enterprises. Said Reese did not keep his own books of account.

"Ninth—That said Michael Reese was not in the habit of examining legal questions, or reading legal decisions or statutes for himself. And as a conclusion of law, the Court finds that the true construction of said will is, that by the residuary clause thereof, the said residuary legatees take the residue of said estate as follows, that is to say: The said Eliese Frank, two-elevenths (2-11) parts; the said Henrietta Rosenfeld, two-elevenths (2-11) parts; the said Hannah Rosenberg, two-elevenths (2-11) parts; the said Therese Weinman, one-eleventh (1-11) part; the said Lena Kohn, one-eleventh (1-11) part; the said Hannah Goldsmith, one-eleventh (1-11) part; the said Carrie Manheimer, one-eleventh (1-11) part; and the said Rosa Rothschild, one-eleventh part of said residue or surplus, and not otherwise."

The decree of the Court was in accordance with the conclusions of law above given.

The parties to whose claims the judgment of the Court below was adverse, who are the sisters of the half-blood and the nieces, moved for a new trial, which was denied, and the same parties prosecute an appeal to this Court from the judgment and the order denying their motion for a new trial.

During the argument a question was raised as to the juris-

diction of the District Court in this case. A difficulty was suggested by a member of the Court on the ground that the Probate Court had jurisdiction of the subject-matter of this cause, and that its jurisdiction was exclusive. We have considered this question, and in our opinion, the jurisdiction of the District Court was ample and plenary.

The jurisdiction of the District Court was conferred by the amendments of 1862 to the Constitution of 1849. (See 6th Section of Art. VI.) In this section it is provided that "The District Courts shall have original jurisdiction in all cases in equity."

The jurisdiction could hardly have been conferred in clearer or broader language. The language of the sixth section of this Article, as it was adopted in 1849, was no less broad.

This section as amended in 1862, has been construed by this Court, as conferring on the District Courts the same jurisdiction in equity as that administered by the High Courts of Chancery in England. (*People vs. Davidson*, 30 Cal. 379.) In *Willis vs. Farley*, 24 Cal. 500, it was held that the Constitution (Art. IV, Sec. 6) invests the District Court with original jurisdiction in all cases in equity. The Court further said in that case: "Powers which are granted by the Constitution cannot be taken away by legislative enactment, and remedies which are secured to the citizen by the organic law cannot be destroyed by a department of the Government that exists in subordination to the Constitution." This was an action brought against the administrator of a deceased mortgagor and his heirs, to foreclose a mortgage. See also *Clark vs. Perry*, 5 Cal. 60; *Sanford vs. Head*, Id. 298; *Deck vs. Gerke*, 12 Id. 436. In the last cited cause Baldwin, J., in the opinion of the Court, says on this subject: Apart from the previous decisions of this Court, it might be questioned whether the Probate Court, under our Constitution, did not possess an exclusive jurisdiction over testamentary and probate matters. (*Blanton vs. King*, 2 How. Miss. 856; *Carmichel, vs. Browder*, 3 How. Miss. 252; *Force vs. Graves*, 4 S. & M. 707.) But this Court has recognized a different rule. In *Clark vs. Perry* (5 Cal. 60) it was held: 'The Probate Court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the Court of chancery, which still retains all its jurisdiction. Where, therefore, a bill is filed in chancery against an administrator, to compel him to account, by one who has not been an actual party to a proceeding or settlement in the Probate Court, he may totally disregard such proceeding or settlement; and although the settlement in the Probate Court is a final settle-

ment, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the District Court, and compel the administrator to a full account.' And in *Sanford vs. Head*, (5 Cal. 298) the same doctrine was reaffirmed in emphatic terms. The ground upon which equity took jurisdiction in England in such cases was, that the Spiritual Courts were not able, from their constitution, to afford adequate and complete relief. (1 Story's Eq. Jur. Sec. 530 *et seq.*) Though much of the reason of this rule is removed in most of the States of the Union where Probate Courts exist, yet the power of the Chancery Court to interpose for the settlement of accounts, and the enforcement of trusts of this sort, is maintained. Under the decisions of this Court, chancery has assumed jurisdiction over such subjects, and as, probably, rights have vested under their decrees, and the principle asserted is more convenient in practice, we think it is not permissible now to question the jurisdiction." (12 Cal. 436.)

The Court in this case sustained a very broad jurisdiction in the District Court.

The jurisdiction here invoked was exercised in the case of *Payne vs. Payne*, 18 Cal. 291, in construing the will of Theodore Payne. One of the points determined in that case, was as to whom the estate was devised, which might have been determined by the Probate Court on the distribution of the estate by that tribunal. The Court held that the whole estate was devised to the widow to the exclusion of the children. There was no doubt expressed or intimated as to the jurisdiction in that case.

The power of the Court of chancery in England over the administration of estates does not seem to have been thoroughly established until near the close of the reign of Charles II. (See Story's Eq. Jur. Sec. 542.) After the statute in England had been enacted empowering the spiritual Courts to make distribution, it was contended that that court ought to make distribution, and that the Courts of chancery no longer had jurisdiction. In answer to this contention the Lord Chancellor King said in 1682, the "spiritual Court had but a lame jurisdiction, and there being no negative words in the Act of Parliament, he thought a bill for distribution very proper in this Court"—referring to the Court of chancery in which he presided. (Story's Eq., Secs. 542-3; *Gould vs. Hayes*, 19 Ala. 449. See further, Story's Eq., Sec. 1,065.)

The jurisdiction of the Probate Courts is not defined in the Constitution. In the eighth section of Article VI,

(Const. of 1849), it is provided that "the county judges shall also hold in their several counties probate courts, and perform such duties as probate judges, as may be prescribed by law." In the seventh section of the same article it is provided: "In the city and county of San Francisco the Legislature may separate the office of probate judge from that of county judge, and may provide for the election of a probate judge, who shall hold his office for the term of four years."

It seems from the above that the Legislature may make the jurisdiction of the probate judge or court what it pleases within the limits of that jurisdiction, which is understood as usually pertaining to probate courts. But the position that it can, under this power, take away from the district courts any of the equity jurisdiction conferred on them by the Constitution, is manifestly untenable. (See *Willis vs. Farley*, 24 Cal. 499, above cited; also *Gould vs. Hayes*, 19 Ala. 450.)

Nor could this be done if the full probate jurisdiction was conferred on the county or probate courts by the Constitution. This very point was so held in *Courtwright vs. The Bear R. and A. W. & M. Co.*, 30 Cal. 573, in relation to the jurisdiction to abate nuisances under the constitutional amendments of 1862. This Constitution gave jurisdiction to the county courts in plain terms "to abate a nuisance." (See Sec. 8, Art. VI). An action was brought in the District Court to abate a nuisance, and it was sustained as an equity case under the grant of equity jurisdiction. The question is fully discussed in the opinion of the Court by Rhodes, J. to which there was no dissent, Sanderson, J., expressing no opinion. This ruling was subsequently approved in *Yolo County vs. City of Sacramento*, 36 Cal. 195. (See also *Caulfield vs. Stephens*, 28 Cal. 118; *Stoppelkamp vs. Mangeot*, 42 Id. 325.)

As was said by Bronson, J., in *Delafield vs. State of Illinois*, 2 Hill, 164: "There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is not like a grant of property, which cannot have several owners at the same time. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or a privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it

before possessed. Creating a new forum with concurrent jurisdiction may have the effect of with drawing from the courts that before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands."

For the reasons above given we are of opinion that the District Court has jurisdiction of this cause.

But it is said that the Probate Court first acquired jurisdiction, and therefore must be allowed to exercise it to the exclusion of the District Court. We do not think that this rule can be properly applied here. The will, so far as we are informed by the transcript, had only been admitted to probate in the Probate Court. The matter of distribution was not before it. The proceeding in that Court had not progressed to that point. Moreover, the Probate Court held its jurisdiction subject to the exercise of this jurisdiction by the District Court. The paper was not the operative will of the testator until probate had been had. It cannot be offered in evidence to show title until it has been proved. (*Castro vs. Richardson*, 18 Cal. 478.) Of the probate the jurisdiction of the Probate Court is exclusive. (Id. 470.) Until that was done the District Court could not exercise the jurisdiction invoked in this case. To hold that the Probate Court had first acquired jurisdiction to the exclusion of any other Court, by the will having been admitted to probate in it, would be to oust the jurisdiction of the District Court entirely. The Probate Court taking jurisdiction under these circumstances, it holds it subject to the jurisdiction of the District Court, and must be bound by the decree of the District Court. We are of opinion that this jurisdiction in the District Court is a beneficial one, and can be usefully employed in expediting the settlement of estates.

To return to the main question: Certain rules are prescribed by the Civil Code for the interpretation of wills. Those rules seem to be in accord with the rules heretofore laid down by courts for such interpretation, and which have been for a long period of time acted on. (See *Broom's Legal Maxims*, on maxim "*Benignae faciendae*" p. 534, *et seq.*) These rules are as follows:

1. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible. (C. C., Sec. 1317.)

2. In case of uncertainty arising upon the face of the will, as to the application of any of its provisions, the testa-

tor's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations. (C. C., Sec. 1318.)

3. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. (C. C., Sec. 1324.)

4. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. (C. C., Sec. 1325.)

5. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail. (C. C., Sec. 1321.)

The particular question presented here is, what effect is to be given to the words "*pro rata*" in the residuary clause? To what do they refer? That these words were intended to be "*pro rata*" there can be no doubt. What, then, is their meaning, and to what do they refer?

This expression is of very common use. So frequent is and has been its employment in daily intercourse among all classes of men, that it may almost be said to have become part of our vernacular. From it, a verb, "*pro-rate*," has been derived and become a part of common English tongue, with all the characteristics of such a part of speech. (See Webster, word *pro-rate*.) This verb is found used in the appropriate moods and tenses, with participles, and is thus defined: "To divide or distribute proportionately; to assess *pro rata*."

These words *pro rata* have a defined and well understood meaning. They are defined as follows by the two most famous lexicographers of our time. Webster defines them as follows: Latin, *pro rata* (sc. *parte*), according to a certain part; in proportion." Worcester thus defines them: "(L. according to the rate), (com.) in proportion."

The word "*rata*" is participle of the Latin verb *reor*. Its principal parts are thus given in Ainsworth's "English-Latin Dictionary:" "*Reor, veri, ratus*"—meaning, according to the same authority—To suppose, judge, deem or think; to imagine."

This expression is of frequent use in statutes, in the opinions of learned judges, and by text-writers on various titles of the law. A long list of references will be found in the brief filed in this case by one of the counsel for respondents. (See brief of S. M. Wilson, Esq., 19, 20, etc.) We will content ourselves with citing some of them. In statutes,

Secs. 5091, 5102 of the Revised Statutes of the United States; 5th U. S. Stats. at Large, Sec. 5, p. 444; Sec. 10, p. 447; 10 Id. 304; 14 Id. Sec. 27, p. 529; Secs. 1645, 1648, C. C. P.; Insolvency Act of 1880, Sec. 31; Cowdery's Insolvency Law, 45.

In opinions—See *Adams vs. Haskell*, 6 Cal. 116; *Adams vs. Hackett*, 7 Id. 183. *Adams vs. Woods*, 8 Id. 155; S. C. 8 Id. 311; *Naglee vs. Minturn*, 8 Id. 540, 541, 543, 544; *Kehv vs. Smith*, 2 Wall. 25; *Pollard vs. Baily*, 20 Id. 527; *Cazo vs. Baltimore Ins. Co.* 7 Cranch, 362; *U. S. vs. Kansas P. R. Co.* 99 U. S. 458; *Myrick vs. Thompson*, Id. 291; *In re London I. N. Co.* 5 Law Rep. Eq. cas. 1867-8, 526, 7; *Goodman vs. Pocock*, 15 Q. B. 576, 581; *Vlienboom vs. Chapman*, 13 M. & W. 248; *Main vs. Maurice*, 1 Lansing, 352, 3.

By authors of books on the law—As to "*pro rata itineris*," see 3 Kent's Com. 229, etc.; Abbott on Shipping, 525, 547; as to *pro rata* contribution by property saved on a general average, see Abbott on Shipping, 502 *et seq.*

Where a voyage is not completed, and the goods are with the consent of the owner returned to him, the carrier being willing to complete the voyage, a payment of freight is allowed in proportion to that part of the voyage accomplished, and the freight so allowed is usually styled freight "*pro rata itineris*." As the entire freight for the entire voyage, so the partial freight for the partial voyage is allowed.

It is needless to multiply citations or illustrations further on this point. It is well understood by persons of ordinary intelligence to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made, must be indicated by the words spoken or written by the speaker or writer.

Now are any fund and rate or standard indicated by the writing which we are called on to interpret?

In relation to the fund, there cannot certainly be any difficulty. It is the residuum of the estate after the payment of the debts and the legacies specifically defined in the will.

Is there any rate or standard manifested by the words used in the will?

As has been pointed out, the testator, after directing the payment of his debts as soon as possible, orders that the rest of his property shall be converted into cash within five years after his death by his executors, and the fund so created to be divided as follows:

"To my sisters Eliese Frank, Henerietta Rosenfeld, Hanna Rosenberg * * * one hundred thousand dollars *each* to my sisters Therese Wienman and Lena Cohn * * * fifty thousand dollars each. To Jakob Rosenberg * * * in trust for Hannah Goldsmith, Carry Manheimer and Rosa Fuller one hundred and fifty thousand dollars."

He then proceeds to make bequests to several persons and corporations, embraced in seventeen different clauses, which intervene the clauses containing the bequests above quoted, and then disposes of the residuary estate in words which have been quoted above.

Now the same persons are referred to as beneficiaries in the last clause just above referred to and quoted, as in the first quoted clause. The reference in both clauses to the same persons shows that the dispositions of the first clause were in the mind of the testator, when he wrote the last clause. The mode of distribution between those persons was then to be manifested—and he provides for a *pro rata* distribution among them. But according to what rule is this *pro rata* distribution to be made? This is to be provided for, and the testator adopts as the rule denoting the proportion in which the distribution is to be made, the sums mentioned in the first clause. In effect, he provides in this last clause, that the residue shall be divided among them in the same proportion which the sums mentioned in the first clause indicate.

The reference to the first clause by the last is plainly manifest, from his mentioning the same persons in both as beneficiaries. The *pro rata* distribution is to be in accordance with some rate previously indicated. The sums mentioned in the first clause of themselves furnish a rate or proportion, and it becomes unnecessary to indicate any other. To indicate any other in accordance with his wish, would have merely led to a repetition of what had been manifested by the expressions of the first and leading clause of the paper he was drawing. It is scarcely to be supposed that the ratio or proportion of distribution would be indicated in the clause in which it is mentioned. This is not usually the mode in which a division *pro rata* is directed. In the instances referred to above, whether in statutes, judicial opinions, or in the text of law writers, the *pro rata* distribution is spoken of in relation to something outside of the clause ordering or referring such distribution, and not in the clause itself. The same is true of the ratio or proportion of distribution.

It is contended on behalf of Therese Weinman and Lena Cohn that the ratio or proportion of distribution referred to

by the word *pro rata*, is one according to which the residuary estate is to be divided into six parts, so that each of the sisters is to recover one-sixth of the residuum, leaving the remaining sixth to his nieces Hanna Goldsmith, Carry Manheimer and Rosa Fuller.

It is urged that the words *pro rata* mean a proportion fixed *rata*—established according to a rule—and that that rule is fixed by the statute of distribution; that this rule would fix the proportion according to which a division should be made, and thus the distribution or division would be *per stirpes* according to the statute, into six parts, each of which would be a sister's share. This would lead to the division just above stated, according to which each of the sisters would get a sixth, and the nieces the remaining sixth, or one-eighteenth each.

We see no grounds whatever for such a construction of the words of the residuary clause. It seems to us conjectural, fanciful and untenable. There is nothing in the will suggestive of such a view; on the contrary, the contents of the will indicate something entirely different. There is nothing in it which affords any ground to conjecture that the testator intended to adopt the statute of distributions as a rule of distribution of the residuum or any other portion of his estate. The language of the will supports the inference that he intended to steer clear of any such mode of distribution.

The contention put forth on the part of the nieces (Hanna Goldsmith, Carry Manheimer and Rosa Fuller, the last now Rosa Rothschild, having since the execution of the will married a gentleman of that name), is that *pro ratu*, though it means "proportionally," "according to a proportion," and is not a synonym for *equally*, yet a *pro rata* division constantly results in an *equal* division, and that since a *pro rata* division so results, therefore the division to be made of the residuary estate in this case must be into eight equal parts or shares, of which each of the persons named in the residuary clause is to have one part or share. This, as we understand it, is the contention of the learned counsel for the nieces. But he admits "it may be equal or unequal, according to the standard fixing the proportion of the division."

If it be admitted that the standard fixing the proportion of the division is the number (eight) of persons mentioned in the residuary clause, then the conclusion contended for follows.

We see no reason to conclude that a division into eight

shares was intended. There is nothing in the expressions of the paper to be construed which indicates such an intention.

If this had been the intention of the testator, or if his intention had been such as contended for by the half-sisters, Therese Weinman and Lena Cohn, it could have been readily expressed. It could have been easily indicated by stating that the eight persons should receive the residuum equally to be divided between them. Such a mode of disposing of property to be equally divided is so common that it cannot be supposed that it would not have occurred to the testator, and been adopted by him, if such had been his wish.

There is nothing to show that the testator did not understand the meaning of the expression *pro rata* and all other expressions used in his will, nor would we be authorized in coming to any such conclusion. On the contrary, the clearness with which the will is drawn, and the uncontradicted evidence embodied in the transcript, authorize the conclusion that he was a man of strong, clear mind, and that he knew how to use language to express his thoughts.

Edward J. Pringle, an able and learned member of the bar of the city of San Francisco, states in his testimony that he knew Mr. Reese for about twenty-five years, and during a considerable portion of that time had a good deal to do with Mr. Reese in his law business; that "he was a remarkably shrewd man of business;" "he was a man of remarkable ability—one of the ablest men I have ever met by way of natural talent—a man of large memory." The same witness further states: "He was a man exact to know his bargain and the terms of his bargain. He was a man of great details in his bargains and contracts. He made his bargains with great care—in buying and selling." Mr. Pringle had abundant opportunities of ascertaining what he testified about, and was a competent judge as to the testator's mental endowments.

Another witness, Joseph Rosenberg, who had opportunities of knowing the testator well and of an extended acquaintance with his business habits and qualifications, as he was in the management of much of Reese's business from 1872 to his death in 1878, and intimately associated with him, said: "I could not approximate the amount of his annual business. *It ran into millions.* He bought and owned a great deal of real estate, and purchased bonds, warrants and stocks. He always took a great pride in attending to money matters, and was very methodical in the mode of conducting and managing his business. He had a great deal of system and good judgment, and I think in the whole seven years he hardly made a loss." "He was a man in the habit of reading a great

deal; subscribed for German periodicals, and read and quoted Shakespeare a great deal, a great many other books and German periodicals, and read the daily papers."

Such testimony establishes the clear intellect and sound judgment of the author of the will in question; and shows a capacity displayed in the will to express his ideas with force and clearness. Though much of the orthography is incorrect, it is clear and perspicuous, and its meaning can be understood. It is of frequent occurrence that men of clear and vigorous minds and who think, speak and write clearly, spell badly. History affords many instances of it. Carlyle says that Marshal Saxe was the "worst speller ever known." The great Duke of Marlborough, who was not only distinguished as a successful warrior but also as an able statesman among able statesmen, had the same failing, and, if we may credit Madame de Remusat, Napoleon was remarkably deficient in writing and speaking the French language, which may be said to have been his native tongue. The phonetic style of writing does not necessarily detract from the clearness of a composition. In relation to this will, one of the learned counsel (H. S. Monroe, Esq., of the Chicago Bar), who argued the cause before the Court, stated that he saw no want of clearness in any part of the will, except in the clause in regard to the residuary estate. This can rarely be said of a paper disposing of so large an estate, containing so many provisions.

It is evident from the testimony above referred to that the testator, whose early education was limited, endeavored by reading, to repair the deficiency consequent upon it. His early instruction was supplemented by efforts through his life to educate and improve his mental powers and enlarge his attainments; and they were further improved and enlarged by intercourse and contact with men of vigorous minds—a means of education often far superior to that of mere scholastic training.

On the argument and in the briefs filed, numerous cases were referred to and commented on. An examination of them has convinced us that they offer no obstruction to the conclusion here reached. The case before us is one of interpreting the meaning of a written document, and decided cases afford but little aid in arriving at a correct interpretation. We hazard nothing in saying that this is in accordance with the universal experience of gentlemen learned in the law, who have been frequently called on to employ their faculties in the solution of such questions. The good sense of what was said by Washington, J., in 1803, in *Lambert's*

Lessee vs. Paine, 3 Cranch, 131, will be generally acknowledged: "Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike." (See Redfield on Wills, 423; *Cook vs. Weaver*, 12 Geo. 47; 4 Kent's Com. 534.)

The contentions of the counsel for appellants are based on the proposition that the residuary clause of the will does not refer to the antecedent clause in the beginning of the will, and therefore the residuary clause must be construed as entirely separated from such antecedent clause. As has been said above, such a view is not maintainable. The reference to the antecedent clause is in our judgment, clear and manifest.

The conclusion here reached is in accordance with natural affections. The full sisters get a larger share than the half sisters, and the half sisters are placed on an equality with the children of a full sister.

Admitting that our statute makes no difference between sisters of the whole and the half blood in the distribution of the estates of intestates, still this matter of natural affection cannot be regulated by law. It follows other laws existing in the nature of man. Generally we should expect to find a stronger attachment to the sisters of the whole than to those of the half blood.

Our conclusion is that the Court below committed no error in its rulings and the judgment and order denying a new trial are affirmed.

We concur: Morrison, C. J., Sharpstein, J.

CONCURRING OPINION.

I concur in the judgment and in what is said by Mr. Justice Thornton respecting the construction of the will of Michael Reese, deceased. With respect to the question of jurisdiction, I would be inclined to hold, if the question was before us as an original proposition, that the construction of the will of a deceased person was, under our late Constitution and laws, within the exclusive province of the Probate Court. But the jurisdiction of the District Courts in such cases has been recognized by previous decisions of this Court, under which it is probable, important property rights have vested, for which reason I think the question ought not now to be agitated.

Ross, J.

DISSENTING OPINION.

This is an action brought in a District Court, prior to the adoption of the new Constitution, by the executors of the will of one Reese, against the residuary legatees, for the purpose of obtaining a construction of the will. The plaintiffs allege that the will was probated in San Mateo county, where the administration is still pending; that doubts have arisen and are entertained by the plaintiffs and other parties to this action as to the true intent and construction of said will, and particularly the residuary clause aforesaid, and that the plaintiffs are desirous that a judicial determination may be made of the various questions arising on said will involving the points and particulars hereinafter mentioned, and a construction given to the same, so far as may be necessary to guide and direct the plaintiffs in the discharge of their trusts as executors as aforesaid, and to settle and finally determine the rights of the parties in the premises."

"That the particular questions on which the plaintiffs desire the opinion and judgment of the Court relate to the claims of the respective legatees aforesaid as to the meaning of the residuary clause of said will, and they ask the Court to construe said will and declare the true intent and meaning of the said residuary clause, and especially to determine in what proportion the estate to be distributed under said clause is to be divided between the said legatees therein named, and what portion each of the said legatees is entitled to receive."

"That the determination of said questions is necessary for the guidance of the plaintiffs as executors aforesaid, and the settlement and distribution of the estate."

"Wherefore, the plaintiffs pray that the questions arising upon said will as aforesaid, and such other questions of difficulty or doubt in the construction of said will as may be presented by the answers of the defendants, or any of them, or otherwise properly brought before the Court, may be judicially determined and adjudged, to the end that the same may be finally settled, and that the plaintiffs may be directed how to proceed in the execution of their trust; and for such other and further relief as the Court may deem proper."

The defendants answered, setting up their respective claims to share in the residue of the estate, but no question is made by either party as to the jurisdiction of the Court. That question seems to have been studiously passed over in the pleadings. Attention, however, was directed to it on the argument.

After listening to elaborate and learned arguments regarding the points presented I am free to say that, in my opinion,

as a matter of law the view taken by the Court below as to the proper construction of the will is correct; but I can not join in a vote to affirm the judgment, because by so doing I should tacitly join in saying that the Court below had jurisdiction, and that under the late Constitution the District Courts had at least concurrent if not exclusive jurisdiction in many matters concerning the administration of the estates of deceased persons. In my opinion, the action should have been dismissed by the Court below for the following reasons:

I. Under our system, a Court of equity, as such, has no jurisdiction over the subject-matter of this action. The claim of jurisdiction is based upon the clause in the late Constitution, Article VI, Section 6: "The District Courts shall have original jurisdiction in all cases in equity." This language would seem to fully support the claim of jurisdiction; but let us see how far that would carry us. Formerly, equity had jurisdiction,—

1. It had general jurisdiction over cases of administration. (1 Story's Eq. Jur., Secs. 530 to 589.) The ecclesiastical Courts or the ordinary could appoint an administrator, could settle an account of an administrator, and direct the delivery of a legacy to the legatee, but could not compel an administrator to render an account, nor compel many other acts necessary to the settlement of the estate; therefore, equity assumed jurisdiction, to the end that justice might be done. Does any one now suppose, that under our system it is necessary, or even admissible, to go into equity to compel an accounting by an administrator? Yet, the entertaining of a bill to compel an administrator to render an account is as much within the clause "all cases in equity" as is a bill for the construction of a will before distribution.

2. A creditor could not prove his claim before the ecclesiastical Court or the ordinary, nor obtain its payment. (See Story, *supra*.) His resort was to a Court of equity to prove his debt and have it established, and then to have his action at law to recover. What lawyer in this State having a claim against the estate of a deceased person for a debt, would go into a Court of equity to have the claim established? And yet, the establishing of a debt against the estate of a deceased person is as much within "all cases in equity" as is the construction of a will before distribution.

3. If a testator did not dispose of the residue of his estate, "the spiritual Courts had no jurisdiction whatever to enforce a distribution." So equity assumed jurisdiction and enforced a trust in the executor in favor of the heirs-at-law. Does any one in this State suppose that if there be a residue undisposed

of by the will, a Court of equity can be resorted to to ascertain the heirs-at-law, and to have a trust declared in their favor, instead of proving in the Probate Court the heirship and obtaining distribution therein? And yet, the ascertainment of the heirs-at-law and the declaration of the trust are as much the subject of equity jurisdiction, as is the proper construction of a will before distribution.

4. The ordinary had no power over the real estate of a deceased person, and could not subject it to the payment of debts; therefore, if the personality was insufficient, recourse was had to a Court of equity to subject the realty to the claims of creditors. If the claim made in this case be correct, in the few words said upon the argument, as to the power of the Legislature to confer upon the Probate Courts any equitable jurisdiction, it must necessarily follow that the Legislature had no authority to confer upon the Probate Courts power to sell the real estate; and it would also necessarily follow that all sales of real estate had by the Probate Courts in this State conferred no title upon the purchasers—propositions that would not be favorably entertained for a moment. And yet, subjecting real estate to the payment of the debts of a deceased person is as much within “cases in equity” as is the construction of a will before distribution.

5. In England, the spiritual Court or the ordinary, and in America, the surrogate, as such, had no authority, where property was left in trust for an illegal or void purpose, to so determine, but resort was had to a Court of equity, which determined the matter, and declared a trust in favor of the residuary legatee or heir-at-law. I have no doubt that under our system the Probate Courts could determine in such case, and make a proper decree of distribution; and yet, such matter is as much within equity jurisdiction as is the subject matter of the present action.

6. In regard to legacies, no suit would lie at law to recover them, unless the executor had assented thereto; but the remedy was exclusively in the ecclesiastical Courts, or in Courts of equity. In *Ex parte Smith*, 53 Cal. 204, this Court has sanctioned quite a different course; yet, the recovery of a legacy is as much a “case in equity” as is the case under consideration.

7. Bills of discovery were essentially a part of equity jurisdiction. Referring to Sections 1458 to 1461, C. C. P., will it be claimed that those sections are void as trenching upon equity jurisdiction? And yet, is not the relief therein intended to be afforded as much within “cases in equity” as that at bar?

8. Another branch of jurisdiction peculiarly appertaining to equity was the appointment of guardians for infants, idiots and lunatics, and the care and management of the persons and property of the wards. Not a word in the Constitution in terms takes that jurisdiction away from the catalogue of "all cases in equity." Yet, if a strict construction is to be given, what becomes of a jurisdiction exercised for as many years as the State has existed, and applicable to an immense amount of property? If, under the Constitution, the Legislature had no authority to take from Courts of equity any portion of their former jurisdiction and vest it in a Court not strictly one of equity jurisdiction, a result would follow not profitable to contemplate, except for illustration.

9. Specific performance is essentially a branch of equity jurisdiction. Under Section 1597 to 1607, C. C. P., many deeds have been made in this State by executors and administrators, upon orders made by Probate Courts, and the titles thereby attempted to be made have been acted upon and recognized as valid. Yet the compelling of an executor or administrator, representing a deceased person who was bound by contract in writing to execute a deed, is as much a case in equity as is the matter now before us.

I am aware of what is said in 2 Story's Eq. Jur., Sections 1058 to 1074, concerning the jurisdiction of Courts of equity to construe wills in aid of their due execution; but I shall show that, in my opinion, what is there said has no application in this State, so far as concerns questions similar to this under consideration, arising during administration. Just here I will allude to a case to which reference has been made as sustaining the proposition that the District Court had jurisdiction, viz.: *Griggs vs. Clark*, 23 Cal. 427. That was an action brought by an administrator against a surviving partner of the intestate to compel an accounting of the partnership affairs of the intestate, and the defendant, and the Court. Crocker, J., Norton, J., concurring, say: "It is contended that the Probate Court, in which the proceedings for the settlement of the estate were pending, had acquired jurisdiction of the subject-matter of the present action, and therefore the demurrer should have been sustained. The jurisdiction vested in the Probate Court does not divest the District Courts of their general jurisdiction as Courts of chancery over actions of this character." If that decision is authority to sustain the action at bar, I fail to see it.

The case of *Payne vs. Payne*, 18 Cal. 291, is no authority in this case; that was an amicable suit, as this is: neither party raised the question of jurisdiction; it was not passed

upon; it does not appear from the case as reported that the estate was being administered upon in the Probate Court.

II. The Probate Court of San Mateo County had exclusive jurisdiction of the subject-matter of the action, and to determine to whom and in what proportions the estate of the testator should be distributed.

The Constitution of this State, as originally adopted, provided (Art. VI, Sec. 1), that "the judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace, and in such inferior Courts," etc.; and (Section 8) the County Judge shall "perform the duties of Surrogate or Probate Judge." It is not necessary to consider the force and effect of those provisions further than to say that all the cases in this Court upon this subject, from *Wilson vs. Roach*, 4 Cal. 362, to *Payne vs. Payne*, 18 Cal. 291, arose thereunder. In 1862 the Constitution was amended so as to read (Art VI, Sec. 1): "The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts," etc.; and (Sec. 8) "the County Judges shall also hold Probate Courts, and perform such duties as Probate Judges as may be prescribed by law." Then, at least, the Probate Courts were distinctly recognized as, if not established, and were, and since have been, constitutional Courts. Very soon after the adoption of these amendments, this Court, in the matter of the will of Bowen, 34 Cal. 682, Rhodes, J., delivering the opinion, referring to Section 8, said: "This is a comprehensive grant of probate jurisdiction, and as there is nothing in the article granting concurrent jurisdiction, the grant to the Probate Courts must be held exclusive. There may be cases involving matters peculiar to Probate Courts of which the District Courts may have jurisdiction; but matters like the probate of a will, the granting of letters testamentary, or of administration, the allowance of claims, the settlement of the accounts of the executor or administrator, etc., were well understood at the time of the adoption of the amendments to the Constitution as falling within the probate jurisdiction. If, without any express grant like that in the former Constitution, the District Courts can be vested by the statute with jurisdiction of the matters provided by Section 20 of the Probate Act, the jurisdiction to determine every question of fact arising in the Probate Courts may likewise be transferred to the District Courts, and the Probate Courts left as the mere registers of the decisions of the District Courts."

In England the ordinary, and in America the surrogates,

until their jurisdiction was enlarged, were little else than registers.

The amendment to Section 8 says: "Shall hold Probate Courts and perform such duties as Probate Judges as may be prescribed by law." This provision takes from Courts of equity every matter relating to "probate" of which they had formerly had jurisdiction, and confers it upon the Probate Courts. That leads me to consider what is probate. Probate, in England, in the absence of an enlarged meaning by statute, signified *only* the proof of a will either in solemn or common form. (2 Black, Com. 508.) Is that all that the framers of our Constitution meant? or, rather, did they not mean, that which, all matters which, at the time of using the words, was and were understood to be a part of or parts of probate business? Abbott, in his Law Dictionary, title "Probate Court," says: "In many of the United States, Court of Probate, or Probate Court, is used as the title of the Court having general probate jurisdiction—that is, to take proof of wills, to issue letters testamentary, letters of guardianship and of administration, to superintend the administration of estates and accounting of representatives and trustees, and many cognate matters."

Under the Constitution, the Legislature, in prescribing by law the duties of the Probate Courts, did confer upon them power to grant letters testamentary, of administration and guardianship, the management of estates of deceased persons and wards, the compelling and settling of accounts, the discovery of effects, the sale of real estate, the payment of debts, and the distribution of "the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto." This last clause necessarily involves the right and power to ascertain and determine who are entitled thereto. The power was ample; the machinery was ample. The Probate Courts did not require the aid of any other Court in ascertaining any questions of fact before them, and from their decisions an appeal laid directly to the Supreme Court.

From these views, thus briefly stated, I am of opinion that under the late Constitution all matters concerning the administration of estates of deceased persons, such as the matters above referred to, were not to remain "cases in equity," but were transferred and became probate matters; and that in the creation of the various Courts, and in defining their respective jurisdictions, it was intended that one should not trench upon the other, and that there should not be, as to probate matters, concurrent jurisdiction.

The reason why, in former times, equity assumed jurisdiction of the various matters hereinbefore referred to, was because, in England, the ecclesiastical Courts and the ordinary, and in America the surrogates, had no jurisdiction, and had no machinery for affording relief. Those reasons do not exist in this State. With us the Probate Courts had jurisdiction conferred, and had ample machinery provided to hear and determine all matters necessary to a full administration of an estate as between all persons interested in its administration as such.

This view is not in conflict with *Haverstick vs. Trudel*, 51 Cal. 435, nor with *Bush vs. Lindsey*, 44 Cal. 121. It is supported by *Auguisola vs. Arnaz*, 51 Cal. 435, where the Court, Rhodes, J., said: "The Probate Courts have exclusive jurisdiction of the accounts of executors and administrators, and of the final distribution of the estates of decedents."

I admit there may questions arise, as suggested in 51 Cal. 435, *supra*, when the interposition of a Court of equity may be necessary. (See *Theller vs. Such*, Department 1 of this Court, opinion filed May 16, 1881, in which opinion I concur, as presenting a case clearly within equity jurisdiction.) But the case at bar does not present such a question. In my opinion the construction of the will in question was as much within the power of the Probate Court of San Mateo County, for the purpose of determining the persons to whom and the proportions in which the residue of the estate should be distributed, as would have been the hearing of evidence and determining as to heirship if the deceased had died intestate.

III. Even admitting, which I do not, that there was concurrent jurisdiction in the District Court and in the Probate Court, there is a well-known principle that where two separate tribunals have jurisdiction over a subject, that which first takes jurisdiction shall have exclusive jurisdiction. The Probate Court, by probating the will, acquired and had jurisdiction of the subject-matter of the estate, to and including the ascertainment of the persons entitled to the residue and its distribution among them; and no other tribunal could take jurisdiction of any matter concerning the administration of the estate, of which the Probate Court could in any event have jurisdiction. It therefore follows, that as the Probate Court was the only Court in which a will could be probated, no other Court could acquire any jurisdiction over the subject-matter of this action. Was the Probate Court to suspend its functions, and arrest its proceed-

ings, until it should receive the advice of another Court? Would that advice, when given, be binding upon the Probate Court? if so, by what authority? Where is it so set down? Suppose this Court should affirm the judgment of the Court below, and the decree should be taken to the successor of the Probate Court—would that decree be binding upon that Court? No appeal from the Probate Court is here—its judgment has not been given.

IV. The executors have no concern as to how the estate should be distributed. It is quite immaterial to them whether the nieces should receive one-sixth, one-eighth or one-eleventh. If a decree had been made by the Probate Court distributing to any legatee more than the executors deemed proper, they could not have appealed from the decree. (*Bates vs. Rybery*, 40 Cal. 465; *Estate of Wright*, 49 Cal. 550.) If so, they could not file a bill to be instructed as to a matter about which they had no concern. In the complaint, they ask the Court "to determine in what proportion the estate is to be distributed," and "what portion each of the said legatees is entitled to recover;" "that the determination of such questions is necessary for the guidance of the plaintiffs as executors aforesaid, and the settlement and distribution of the estate." Their functions were not to be informed how to distribute the estate: their functions were to file and settle their accounts, showing the balance for distribution, and petition that such balance be distributed to those entitled; the Court was then to cause notice to be given to all concerned, and the parties claiming were to present their reasons therefor to the Court, not to the executors; and the Court was to determine what persons were entitled, and in what proportions. As to such determinations, the executors had no voice—they could not be heard—they had no appeal. How can they file a bill asking for advice when the advice asked is entirely immaterial to them. The executors were officers of the Probate Court, and of no other. To that Court only could they look for advice and direction as to any matter within its jurisdiction, even where the advice is material to them.

The judgment should be reversed, with directions to dismiss the complaint.

Myrick, J.

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- ACT OF CONGRESS—Hopper, the grantor of plaintiff, received from one Baxter a conveyance of a portion of a lot in the town of Petaluma, prior to the passage of the Act of Congress of March 1, 1867, quieting title to land in Petaluma and Santa Clara, in which conveyance Baxter reserved a right of way; and such right was, together with the balance of the lot, afterward, and before the passage of the Act of Congress, conveyed by Baxter to defendant: Held, that defendant's easement was not destroyed by said Act; that it was intended by the Act to perpetrate and not to destroy existing possessory rights—not only the tangible occupancy, but all rights to the land acquired by virtue of the occupancy, including easements.—*Neal vs. McNear*..... 686
- See EJECTMENT.
- ACTUAL NOTICE—EQUIVALENT TO WRITTEN NOTICE—Actual notice of the rendering of a decision is equivalent to written notice, and the time for filing a memorandum of costs runs from the time of such actual notice.—*O'Neil vs. Donohue*..... 494
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- TO BE IN WRITING**—Though an order be deemed excepted to, yet the appellate Court will not review the ruling unless the exception is reduced to writing and settled in a bill within the statutory time.—*Nash vs. Harris*..... 223
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The objection that the verdict is contrary to the evidence is not tenable where the bill of exceptions recites that each party introduced evidence tending to sustain the issue.—*Id.*
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ASSAULT WITH INTENT TO KILL —Where the Court charged that, to convict, the jury must find that if death had ensued from the wound inflicted the offense would have been murder, either in the first or second degree, is a correct statement of the law.— <i>People vs. Ah Loy</i>	17
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- Where the Court charged the jury by reading from several well settled authorities, without pointing out its inconsistency with the rule of law as established in this State, it was held error.—*People vs. Messersmith*..... 106
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- Laws relating to perpetuities, requiring the objects and beneficiaries of voluntary trusts to be specified, do not apply to trusts for charitable uses.—*Id.*
- See **WILL**.
- CITY OF LOS ANGELES**—Where a city, as successor to a pueblo, had exercised control of, and had exclusive right to, the use of the waters of a river since the year 1781, and such right had always been recognized, acknowledged and allowed by the owners of land at its source and bordering on its banks, including the grantors of plaintiff, the plaintiff could not enjoin defendant from obstructing the plaintiff in the use of so much of the water as was necessary to supply the needs of the inhabitants of the city with water.—*Feliz vs. City of Los Angeles*..... 652
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- CLERK OF SUPREME COURT**—**CONSTITUTIONAL LAW**—The Act of April 23, 1880, reducing the salary of the Clerk of the Supreme Court, did not apply during his term of office. The old law providing for the election of Clerk of the Supreme Court, prescribing his duties, and fixing his compensation, which was in force at the time of the adoption of the new Constitution, not being inconsistent therewith, was continued in force until changed, and is to be treated as if the new Constitution had been in force at the time of its passage.—*Gross vs. Kenfield*..... 127
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- CONFLICTING CLAIMS**—An allegation that plaintiff is the owner and seized in fee of land which is held in trust by him for the use and benefit of a church, coupled with an allegation that defendants claim an estate or interest in the land adverse to him, presents a case of conflicting claims to real property.—*Mora vs. Leroy*..... 633
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The Supreme Court has jurisdiction to adjudge as to contempts, and to punish therefor.— <i>Pickett vs. Wallace</i>	117
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CHANGING TERMS —Parties may, for a sufficient consideration, change the terms and modify the conditions of a contract.— <i>Brickell vs. Batchelder</i>	733
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CONVEYANCE —A deed executed by a widow of "all her right, title and interest in the real estate left by her said husband" does not convey her right to a homestead, or estop her from claiming a homestead out of his property.— <i>Estate of W. H. Moore</i>	299
It only conveys her interest which she acquires by succession under the law.— <i>Id.</i>	
A grant upon condition subsequent, which is subsequently defeated by the non-performance of the condition, entitles the grantor to a re-conveyance from the grantee.— <i>Liebrand vs. Otto</i>	766
See DEED; MORTGAGE.	
CORPORATIONS—SUBSCRIPTION TO STOCK —Where the plaintiff was not a party to the subscription paper for the incorporation of a company when signed by the subscribers, nor a successor to the subscribers, nor did the subscribers join in forming the corporation or become members thereof, he could not recover the subscription; and if the subscription could be treated as an agreement to purchase stock of the corporation, there was a want of mutuality, as the presumption is that the corporation had no stock to sell.— <i>Cal. Sugar Manfg. Co. vs. Schaefer</i>	237
A party subscribing for stock of a corporation is to be treated the same as the stockholders, and is not liable for more than the amount of an assessment duly levied.— <i>Id.</i>	

- Trustees of a corporation cannot vote themselves the property of the corporation.—*Shattuck vs. Oakland Smelting and Ref. Co.*..... 547
- ACCOUNT STATED—A resolution of the trustees of a corporation to the effect that it had been deemed expedient to have had conveyed to certain persons stock of the corporation, and that the trustees had so conveyed the stock, followed by a resolve that the trustees should be allowed a certain sum for the shares of stock so conveyed and for services rendered, has none of the elements of an account stated.—*Id.*
- RECLAMATION DISTRICT—A reclamation district is a public corporation.—*People ex rel. Attorney-General vs. Williams*..... 120
- Hoke vs. Perdue*..... 680
- EXTENDING EXISTENCE—A corporation electing to continue its existence under the Code, by filing its certificate of incorporation in the office of the Clerk of the county where the original articles of incorporation were filed, and the certificate required to be filed for the purpose of extending its term in the same office, sufficiently complies with the statute.—*People vs. Pfister*..... 693
- COSTS—SUMMARY PROCEEDINGS—In summary proceedings for the removal of public officers for breach of duty, the clerk of the Court is not authorized to enter judgment for costs against the State where the charges have not been sustained.—*People vs. Kirkpatrick*..... 553
- It is not error to strike from the files of the Court a memorandum of costs which have not been allowed by the Court.—*Id.*
- See PARTIES.
- CO-TENANTS—See TENANTS IN COMMON.
- COUNTER-CLAIM—Matter pleaded in defense of an action does not constitute a counter-claim, or entitle defendant to affirmative relief.—*Brannan vs. Paty*..... 385
- An averment in an answer will not constitute a counter-claim unless it is so denominated and appropriate relief prayed for.—*Id.*
- COUNTY INDEBTEDNESS—See FUNDING ACTS.
- COURTS—Trial Courts should place before them the statute book, and follow its provisions.—*People vs. Nichols*..... 436
- COVENANTS—In a deed of land with a covenant for a right of way over another part of the land, in order to bind defendants—heirs of the grantor—they should have been named in the covenant; that the words "said street forever be and remain free and open as a public street" were either a covenant of seizure, a breach of which occurred so soon as the covenant was executed, or they were a covenant in the nature of warranty for quiet enjoyment, which was not broken until the assertion of paramount adverse and legal right.—*McDonald vs. McElroy*..... 343
- Under the Act of 1855, heirs were made answerable upon the covenant of their ancestor to the extent of the land descended to them through the machinery of the Probate Court.—*Id.*
- A claim for a breach of such covenant must be presented as a claim against the estate.—*Id.*
- See DEED; LEASE.
- CREDITOR'S BILL—SUPPLEMENTARY PROCEEDINGS—Proceedings supplementary to execution are intended as a substitute for a creditor's bill.—*Pacific Bank vs. Robinson*..... 392
- See EQUIT.
- CRIMINAL LAW AND PRACTICE—Confessions of a prisoner influenced by any inducement, promise, threat or menace, while being transported by the arresting officer, who supplied the prisoner with numerous drinks of whisky which rendered the prisoner lively and talkative, are admissible in evidence.—*People vs. Ramirez*..... 4
- A person who makes an arrest and also appears as a witness against the prisoner may act as interpreter in the examination of other witnesses before the grand jury.—*Id.*
- An order denying a motion to set aside an indictment on the ground that the officer making the arrest acted as interpreter for other

- witnesses before the grand jury is not reviewable on appeal or by motion for a new trial, or for arrest of judgment.—*Id.*
- Where an improper question is asked and answered without objection, there is no error which could be availed of.—*Id.*
- On a trial for an assault with intent to kill, where defendant claimed to have acted in self-defense, any testimony tending to show the nature of the injuries received or tending to corroborate defendant's testimony is admissible, and its exclusion is erroneous.—*People vs. Hall*..... 38
- The Penal Code does not require or permit the proceedings, before the consulting magistrate, to be annexed to the judgment roll.—*People vs. Shubrick*..... 41
- The defendant may show the relations, if any, which the witness sustained towards the deceased and the defendant respectively, and the exclusion of questions tending to draw out such testimony is erroneous.—*People vs. Furtado*..... 113
- It is proper on cross-examination to put such questions as will bring out the situation of the witness with respect to the parties and to the subject of litigation, his interests, his motives, his inclination and his prejudices.—*Id.*
- A defendant, as witness in his own behalf, may be asked on cross-examination if he had not been previously convicted of a felony, and may be compelled to answer against his objection, the question being proper as going to his credibility as a witness.—*People vs. Johnson*... 168
- If the jury believe that defendant, or any other witness, has willfully testified falsely in regard to any fact material to the issue, they are at liberty to disregard and entirely discard the testimony of such witnesses—is not an erroneous instruction.—*People vs. Ah Sing*..... 334
- In the consideration of a case by the jury they have nothing to do with the punishment imposed by law.—*People vs. Jackson*..... 401
- Recording a verdict before it is read to a jury is an irregularity which does not affect any substantial right.—*People vs. Nichols*..... 436
- The personal appearance at the trial of a defendant charged with a misdemeanor is not absolutely necessary.—*People vs. Budd*..... 486
- A defendant offering himself as witness is subject to the rules governing other witnesses, and his reputation for truth, honesty and integrity may be impeached.—*People vs. Beck*..... 628
- VERDICT.—Bad spelling will not vitiate a verdict.—*People vs. Sepulveda*..... 688
- Evidence having been introduced by the prosecution tending to show flight by defendant, the defense having introduced testimony to the effect that defendant voluntarily surrendered himself into custody: Held, proper evidence in rebuttal that defendant hid himself in his house, and, upon discovery by the officers, gave himself up.
- That a defendant was present during the trial of a felony is a matter constituting no part of the record required to be sent up to the appellate Court.
- The absence of a defendant pending the trial for felony is ground for new trial, and the objection must be presented to the appellate Court by bill of exceptions to the order denying the new trial.
- A defendant is entitled to be confronted with the witnesses against him in the presence of the Court, except in the instances specified in Section 686 of the Penal Code.—*People vs. Chung Ah Chue*..... 700
- The reporter's notes of testimony given by a witness upon trial of a former indictment against defendant for the same offense—which indictment had been set aside—are not admissible, although the witness be without the State.—*People vs. Chung Ah Chue*..... 700
- See BURGLARY; EMBEZZLEMENT; FELONY; GAMBLING; HOMICIDE; INDICTMENT; INFORMATION; MURDER; THREATENING LETTERS; USE OF VULGAR LANGUAGE.
- CROSS-COMPLAINT.—If there is no issue joined on a cross-complaint, a finding is not necessary.—*Royon v Guillee*..... 501
- Matters which relate to and are connected with the subject of the action are the proper subject of a cross-complaint.—*Colton Land and W. Co. vs. Raynor*..... 589
- Where defendant set up by way of cross-complaint that plaintiff had

- procured an excessive attachment levy, it constituted no defense or counter-claim, or matter of cross-complaint.—*Jeffreys vs. Hancock*... 613
- A cross-complaint, like a complaint, must, in itself, contain all the facts requisite to entitle the defendant to affirmative relief.—*Coulthurst vs. Coulthurst*..... 716
- See PLEADING.

DAMAGES—FOR CAUSING DEATH—In an action by a widow for damages for causing the death of her husband, the jury may take into consideration the relations existing between them at the time of his death and the injury, if any, sustained by the loss of his society.—*Beeson vs. Green Mt. G. M. Co.*..... 129

The social and domestic relations between husband and wife and their demeanor towards each other are parts of "all the circumstances of the case" in an action for damages by a widow for causing the death of her husband, as provided in Section 377 of the Code of Civil Procedure.—*Id.*

NUISANCES—In mining operations, causing deleterious substances to be deposited in a creek whereby the land of plaintiff is injured, subjects defendants to damages.—*Robinson vs. Black Diamond Coal Co.*..... 279

CONVERSION—The measure of damages in an action for forcibly taking possession of personal property is a fair compensation for the time and money properly expended on its pursuit.—*Fairbanks vs. Williams*..... 773

INJURIES—The owner or occupant of land who, by imitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable to damages for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public.—*Bennett vs. Louisville and N. R. R. Co.*..... 448

See CONVERSION; EXCEPTIONS; SPECIFIC PERFORMANCE.

DEADLY WEAPON—A deadly weapon is one likely to produce death or great bodily injury.—*People vs. Fuqua*..... 789

What is a deadly weapon is a question of law.—*Id.*

When the questions whether the weapon used is deadly depends upon the manner in which it is used, the jury are to determine the character of the weapon under appropriate instructions.—*Id.*

DECREE—See EQUITY.

DEDICATION OF STREET—See COVENANT.

DEED—CONSTRUCTION—An Act cannot be varied, qualified or explained by declarations which amount to no more than a mere narrative of a past transaction, nor by an isolated conversation had or act done at a later period.—*Aguirre vs. Alexander*..... 793

Declarations made by a grantor not contemporaneous with the execution of a deed are hearsay and inadmissible.—*Id.*

CONDITIONS SUBSEQUENT—Where the performance of a condition subsequent is obstructed or prevented by a party to a deed, he cannot take advantage of the want of performance.—*Houghton vs. Steele*..... 147

RECITALS IN—A recital in a deed by plaintiff to defendant that the latter was "about to divert" waters of a creek flowing through plaintiff's land, the granting clause being the right to convey water in pipes over and across the land, is not an admission by plaintiff that defendant had acquired the right to divert the waters of the creek.—*Simmler vs. San Luis Wat. Co.*..... 536

A recital in a deed that the grantor had formerly dedicated the land for a public cemetery, imparts notice of that fact.—*Weissenberg vs. Truman*..... 710

RESERVATION IN DEED—A conveyance of real property containing a clause that the grantor reserved a lien for the unpaid purchase money is in effect a mortgage, and the doctrine of vendor's lien has no application.—*Dingley vs. Bank of Ventura*..... 682

The record of such conveyance is sufficient notice to subsequent parties that the grantor had a mortgage lien on the property.—*Id.*

- RESERVATION OF WATER**—A deed of partition was made containing the following stipulation: "Reserving, however, unto the said parties of the first and second parts the joint right and ownership in and to all the water of the Tibbet Springs, said waters to be developed and taken out at or above the junction of said springs near where the blue granite ledge crops out on the eastern bank, distant about two hundred yards up the stream from a point in the arroyo known as the Devil's Gate." Held, that the reservation did not include a stream of water running on the west side of the arroyo, uniting with the waters running on the east side thereof at a point on the west side of said arroyo some distance below the blue granite ledge.—*Lake Valley Land and Water Asso. vs. San G. O. G. Asso.*..... 696
- OBJECTIONS TO DEED**—It is no good ground of objection that a deed had not been read or its contents explained if a party does not express a desire to have it read or the contents explained; but, Held, in this case, that the reading of the deed and explanation of its contents would not have been of any importance, so long as plaintiffs believed they had no title to the land, but were merely confirming and ratifying a sale and conveyance of it previously made by their mother, as guardian, which they considered valid and binding upon them.—*Robins vs. Hope.*..... 663
- TENDER**—Tender of a deed in pursuance of a contract to convey a perfect title is insufficient if there is a prior mortgage unsatisfied or undischarged.—*Hoeckell vs. Reese.*..... 627
- ACCEPTANCE OF DEED**—When four different papers, including a deed, relating to and involving the settlement of complicated transactions concerning valuable lands, were handed to a party as he was about leaving on a train of cars, and one of them, not the deed, was partly read when the party said he understood it, took the papers, and remarked it was all right; but, after examining them, consulted his attorney, and some forty days afterwards, during which fruitless negotiations for a compromise were going on, returned three of the papers, including the deed: under the circumstances there was no acceptance of the deed as a binding contract.—*Los Angeles Immigration and L. C. Asso. vs. Phillips.*..... 25
- See **CONDITIONS SUBSEQUENT; CONVEYANCE; COVENANTS; FORMER ACTION PENDING.**
- DEED OF TRUST**—**DEEDS OF TRUST**—The law recognizes a distinction between deeds of trust and mortgages.—*Bateman vs. Burr.*..... 274
- A party executing a deed of trust, and making default in payment of money secured thereby, cannot have a sale by the trustee enjoined on the ground that there should be a foreclosure.—*Id.*
- DEMURRER**—A demurrer will not be to a pleading containing more counts than one, all of which are not bad.—*Ramsay vs. Flourney.*..... 731
- RELIEF ON**—If plaintiff is entitled to any relief, a demurrer should be overruled.—*Mora vs. Leroy.*..... 633
- DEFAULT**—See **GOODS SOLD AND DELIVERED.**
- DIVORCE**—Marriage and residence within the State for a period of six months next preceding the commencement of the action are indispensable facts in a complaint for divorce.—*Coulthurst vs. Coulthurst.*... 761
- EJECTMENT**—**TENANTS IN COMMON**—In ejectment between tenants in common, plaintiff is entitled to be let into possession unless ousted five years prior to the commencement of the action, and the co-tenant has continued in the adverse possession since such ouster.—*Packard vs. Johnson.*..... 396
- A tenant in common holding an undivided interest in a tract of land is entitled to maintain ejectment against a mere trespasser or intruder.—*Christy vs. Fisher.*..... 598
- It is error to render judgment in ejectment that plaintiff recover the interest of defendant, the latter being a tenant in common with plaintiff.—*Sherman vs. McCarthy.*..... 719

- PRIOR POSSESSION**—In an action of ejectment where the prior possession of the parties from whom plaintiffs and defendants derived their respective claims of title is a material fact in the case, a judgment roll in a forcible entry and detainer case between the parties under whom plaintiff and defendant respectively claim is admissible as tending to prove prior possession.—*McCourtney vs. Fortune*..... 541
- TITLE IN**—In ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of the title of his adversary.—*Id.*
- EQUITABLE DEFENSE**—An equitable defense to an action of ejectment must contain, in substance, the elements of a bill in equity.—*Kenfield vs. Hayes*..... 549
- DESCRIPTION OF LAND**—An objection to a complaint in ejectment that the description of the land contains no starting point is answered by evidence of the surveyor that the starting point is certain and definite.—*Sherman vs. McCarthy*..... 719
- RE-TRIAL**—An action of ejectment submitted to the jury on the theory that good faith was a necessary element in the defense of adverse possession, and the jury upon special issues having made contrary findings, the cause must be re-tried.—*Cottler vs. Morris*..... 552
- MESNE PROFITS**—On a recovery in ejectment establishing the title to land, the right to recover mesne profits is a legal consequence, and the pendency of an action in the U. S. Circuit Court to set aside the patent, the source of title, constitutes no ground for the stay of proceedings in an action for the mesne profits.—*Avery vs. Superior Court*..... 174
- See **CONTEMPT**; **MESNE PROFITS**; **SAN FRANCISCO**; **STATE LANDS**.
- EMBEZZLEMENT**—**SUBJECTS OF**—Shares of stock are subjects of embezzlement.—*People vs. Williams*..... 685
- EQUITY**—**DECREE IN**—Where a decree is obtained against a defendant for a sum of money, and execution has been returned unsatisfied, a Court of equity has jurisdiction of a bill alleging that the defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant, and depriving him of the fruits of his decree, and praying an injunction and receiver. It is not necessary in such a bill to particularly describe the assets, whether equitable or not, sought to be reached; and a Court of equity will issue an injunction, appoint a receiver, and compel an assignment of all the property of the defendant, when such action is necessary to defeat the fraudulent designs of the defendant.—*Shainwald vs. Lewis*..... 313
- Whether, upon such a showing to the Court by petition in the original suit, a writ of sequestration may not issue, quere.—*Id.*
- Whether, under such an original decree, and upon the showing above mentioned, the Court has not the power to issue an injunction and make an order for a receiver and assignment, without requiring the complainant to file a so-called creditor's bill or to wait for the return of an execution unsatisfied, quere.—*Id.*
- INSTRUCTIONS**—Where the contest was as to whether certain real estate was separate or community property, and there was no evidence that the testator had borrowed money on the strength of his separate estate with which to purchase the premises, an instruction to the effect of purchasing property with money borrowed on the credit of the separate property is abstract, and tends to mislead the jury.—*Estate of Holbert*..... 354
- POWER TO CORRECT MISTAKES**—A Court of equity has power to correct any and all mistakes growing out of the improper recordation of a mortgage.—*Donald vs. Beals*..... 402
- RECEIVERS**—The irregularity of discharging a receiver without notice is no ground for reversing the order discharging him, it appearing that the rights of the parties had been finally settled by the Supreme Court.—*Coburn vs. Ames*..... 408
- After adjudication, defendant being entitled to a portion of the premises, it was error to order the delivery by the receiver of all moneys in his hands to the plaintiff.—*Id.*

- A receiver having been appointed to collect tolls cannot say that he collected tolls wrongfully, but must account for all tolls collected by him.—*Id.*
- REFERENCE**—A reference may be ordered in an equity suit when either party alleges facts showing an accounting to be necessary.—*Jones vs. Gardner.*..... 440
- A person dissatisfied with the report of a referee must except thereto.—*Id.*
- TRIAL BY JURY**—In an equity case a trial by jury is not given as a matter of right.—*Id.*
- It is not error to refuse to submit issues to a jury in the case of a contested will, where such issues have once been presented.—*Estate of Gharky.*..... 561
- Questions relating to evidence, and not as to conclusions to be drawn from evidence, are not proper matters to be submitted as issues to a jury.—*Id.*
- In the case of a contested will, the only questions proper to be submitted are such as arise out of the grounds of contest set forth by contestant. (*Estate of Cartery*, December 21, 1880, affirmed.)—*Id.*
- When the grounds of contest embrace matters which are not ultimate facts, but conclusions of law, the facts relied upon must be pleaded.—*Id.*
- It is entirely within the discretion of the Court to grant or refuse a demand for a submission of the issues raised to a jury; and a refusal to do so is not error.—*La Societe Francaise vs. Selheimer.*..... 115
- CLAIMS OF CREDITORS**—A Court of equity has complete jurisdiction of the claims of creditors against separate partnerships of which a decedent was a surviving member.—*Theller vs. Such.*..... 513
- In such case the Probate Court has no jurisdiction.—*Id.*
- PROPERTY HELD IN TRUST**—Property held in trust by a surviving partner to be applied to partnership purposes, is a special fund which passes to his executor, subject to be applied to the same purposes for which testator held it.—*Id.*
- The rights of the representatives or successors or several partnerships can only be determined by a Court of equity.—*Id.*
- FRAUD**—Where the facts show a plain and palpable fraud by the plaintiff on the rights of the defendant, the Court may declare an instrument executed by the latter a mortgage simply, and may decree an accounting.—*Colton Land and Water Co. vs. Raynor.*..... 589
- RECEIVER**—The receiver in an equity suit by creditors' bill should not be an indifferent person; his duty is to be the active advisory of the fraudulent debtor.—*Shainwald vs. Lewis.*..... 604
- The receiver should employ, in the present case, the counsel of the judgment creditor, though the rule is in general opposed to such employment.—*Id.*
- RELEASE FROM MORTGAGE**—In case a party contracts to convey a certain title to land which, by reason of a mortgage upon it, he is enabled to do, the Court will decree that he cause the land to be released from the mortgage, or, in default thereof, that he secure the plaintiff from the payment of the mortgage, and that he execute to plaintiff a sufficient conveyance, with a perfect title thereto.—*Reese vs. Hoeckel.*..... 641
- TITLE**—A person is conclusively presumed to know the state of his own title to real property when dealing with another who occupies no fiduciary relation toward him.—*Robins vs. Hope.*..... 663
- That the agent of defendants testator made representations to parents of plaintiff's, over whom he had great influence, which were communicated by the parents to plaintiffs—the parents not having been employed by the testator or his agent to procure a deed from plaintiffs—does not show the existence of such confidential relations as would make the parents the agents of the testator, or bind him by their acts or misrepresentations.—*Id.*
- A representation made by a first cousin stands upon the same footing as if made by a stranger.—*Id.*
- That plaintiffs received no consideration for a deed executed to confirm one previously made by their guardian matters not, if the guardian received full value at the time of the execution of the first deed; and

the lack of consideration to plaintiffs would not militate against the bona fides of the execution of the second deed.—Id.

CONSTRUCTION OF WILL—After a will has been probated, and before the estate has been distributed, a Court of equity has jurisdiction to construe its terms, and the Probate Court has not exclusive jurisdiction of this subject matter.—*Rosenberg vs. Frank*..... 813

See **FRAUD; PARTNERS.**

ESTATES OF DECEASED PERSONS—LETTERS OF ADMINISTRATION—

Upon application by petitioner to have letters of administration issued to P. revoked on the ground of the incapacity of P. to act, and that letters be issued to petitioner as heir of deceased, it appearing that upon a former proceeding in the case petitioner had been adjudged to be an illegitimate person: Held, that such adjudication estopped petitioner from subsequently asserting that he was heir of deceased.—*Matter of Pico*..... 780

Where the administrator was incompetent to act, and had been removed, the Court had power to appoint petitioner in his stead, notwithstanding his illegitimacy.—Id.

SALE OF PROPERTY—Real or personal property of an estate cannot be sold or transferred except by order of the Probate Court.—*Estate of Page*. 325

Real estate of a decedent can only be sold in the mode prescribed by law.—*James vs. Throckmorton*..... 242

An order of the Probate Court directing a sale of all the personal estate of the decedent does not authorize a sale of the real estate.—Id.

PARTIES—The ancestor of plaintiff having acquired the interest of the beneficiaries under the covenant: Held, that his heirs, and not the administrator, were the proper parties to sue for a conveyance of the title.—Id.

SALE OF STOCK SUBJECT TO LIEN.—The Probate Court may order the sale of stock of an estate "now subject to a lien," and may subsequently confirm the sale.—*Estate of Kibbe*..... 729

A pledgee is not required to present his claim for allowance if he does not seek recourse against the estate.—Id.

A sale by an administrator is not invalid because, in addition to the full cash value of the property, he receives a note for a portion of the price.—Id.

SETTING APART PROPERTY—A bill of sale by the widow of all the personal property owned by her as heir at law of her husband, made to the husband's children by a former marriage, does not estop her from having the property set apart for family use.—*Estate of W. H. Moore*... 301

DISTRIBUTION—In proceedings upon final distribution of an estate, evidence of findings on the partial distribution is incompetent as to an adjudication upon the rights of the parties, it not appearing that a decree had been entered upon the finding that the parties appeared, or that the Court had obtained jurisdiction to hear evidence regarding such partial distribution.—*Estate of Holbert*..... 354

If the property of an estate is in litigation, the Court may refuse an order of distribution until the litigation is ended.—*Estate of Ricand*. 525

A residuary legatee cannot object to a mode of distribution which in no way prejudicially affects him.—*Estate of Hinckley*..... 381

LEGAL TITLE TO SHARES OF STOCK—Defendant gave to A certain shares of stock of a company of which defendant was president, for the purpose of qualifying A as a director. The shares were found in the safe of the company after the death of A, but there was no evidence that a re-delivery of the shares was made to defendant: Held, that the legal title to the shares was in A at his death and passed to his administrator.—*O'Neil vs. Donahue*..... 494

PARTNERSHIP ASSETS—Assets, debts and credits of a partnership do not become confused with the estate of the surviving partner, but remain separate and distinct.—*Theller vs. Such*..... 513

See **EXECUTORS AND ADMINISTRATORS.**

ESTOPPEL—EQUITABLE ESTOPPEL IN PAIS—In equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.—*Ayers vs. Palmer*..... 184

- An estoppel must be certain to every intent.—*Simmler vs. San Luis Water Co.*..... 536
- ADMISSION—Before an admission can be treated as an estoppel it must be so broad and certain as to admit of no other construction than that the right claimed by estoppel has been admitted.—*Simmler vs. San Luis Water Co.*..... 536
- TITLE—Defendant is estopped from denying title if he has entered into possession of premises with permission of plaintiff.—*Lataillade vs. Santa Barbara Gas Co.*..... 601
- See CONVEYANCE; DEED; JUDGMENT; STATE LANDS.
- EVIDENCE—CONSIDERATION—Parol evidence as to the consideration upon which a release had been executed, does not tend to vary its terms, and are admissible in evidence.—*Stufflebeem vs. Arnold.*..... 173
- EXCLUSION OF DEED—A deed having been offered in evidence, as it only embraced land not in controversy, there was no error in excluding it.—*Porter vs. Woodward.*..... 387
- DECLARATIONS—Declarations of the assignor of a judgment made after the assignment are not admissible against the assignee.—*Ladd vs. Samuels.*..... 442
- LAND PATENT—A patent issued to a railroad company, of land granted by Congress to aid in building its railroad, is relevant evidence to prove its title in an action of ejectment.—*Carr vs. Quigley.*..... 776
- LEASE—The lessee of farming land covenanted that the "stubble" should belong to the landlord. In an action by the landlord's assignee to recover damages for having been prevented from grazing his sheep on the land: Held, that evidence was admissible to prove that by the custom of the locality of the leased premises the word "stubble" included whatever was left upon the ground after harvest time.—*Callahan vs. Stanley.*..... 672
- See WILL.
- EXCEPTION—Where the transcript showed that in the course of the trial for damages for failure to purchase certain bricks, the plaintiff's counsel stated that "all they want to prove is that they were rejected," which was sustained by the Court, there was no basis for an exception.—*Hunter vs. Martin.*..... 201
- TIME TO TAKE—It is not necessary to present a bill of exceptions for settlement, at the time of taking an exception to the ruling made before final judgment.—*Tregambo vs. Comanche M. and M. Co.*..... 636
- Such bill may be presented and settled afterwards, as provided in Section 650, C. C. P.: Held, accordingly, that an exception taken to an order refusing to set aside a default settled more than twenty days after the judgment was entered and filed after an appeal had been taken to the Supreme Court, was properly a part of the record on appeal.—*Tregambo vs. Comanche M. and M. Co.*..... 636
- An exception to a decision rendered upon a motion to set aside a default is an exception "taken at the trial."—*Tregambo vs. Comanche M. and M. Co.*..... 636
- See BILL OF EXCEPTIONS.
- EXECUTION—An equitable interest in real property is subject to levy and sale under execution.—*Fish vs. Fowle.*..... 502
- So the right of a party under a contract to purchase real estate is subject to execution sale, and the purchaser, upon the payment of the unpaid purchase money, is entitled to a conveyance of the legal title.—*Id.*
- See PATENT FOR INVENTION.
- EXECUTORS AND ADMINISTRATORS—ACTION BY—Where, in an action by an executrix as such, the only averment of her representative capacity was "that she is the duly appointed, qualified and acting executrix of the last will and testament of John Ferguson, deceased," a general demurrer thereto should be sustained, as there was no sufficient averment of the fact that she was the personal representative of the estate of deceased, and the complaint did not show a right of action.—*Judah vs. Fredericks.*..... 150

It is necessary for the plaintiff in such case to allege, in a direct and issuable form, that he is such executor and administrator, and it is not sufficient to make the allegation merely as descriptive persons.—Id.

MAY PURCHASE AT SALE—The executor or administrator of an estate is not prohibited from buying from a purchaser at a probate sale any of the property sold thereat; but he cannot do so, or bargain therefor, before such confirmation.—*O'Connor vs. Flynn*..... 156

The law, without reference to the question of good faith, will not allow a person dealing with trust funds to place himself in a position antagonistic to the interests of his *cestui que* trust.—Id.

ACTION AGAINST—In an action against an administrator charging him with fraud in having, in 1859, procured from the Probate Court an order to sell real estate to pay debts, based upon the fact that the final account, filed in 1875, showed that the proceeds of the personal estate sufficed to pay all the debts, and left \$21.75 over: Held, that the facts stated did not of themselves make out a case of fraud or false suggestion on the part of the administrator, and that a finding in his favor by the Court below should be affirmed.—*Richardson vs. Sage* 159

Where a piece of property belonging to the estate of a deceased person was, on proper proceedings, ordered to be sold, and was bid off at a fair price, but before the confirmation of the sale the executor made a bargain with the purchaser to buy it of him at a small advance on the price, and did so: Held, in an action commenced by the devisees therefor, that the executor held the legal title to the property in trust for them, subject to a proper accounting for moneys paid out, less rents received, and any other proper transactions existing between the parties.—*O'Connor vs. Flynn*..... 156

COMPROMISE OF CLAIM—An executor, acting in good faith and for the interest of the estate, may compromise a claim against the estate without preliminary authority from the Probate Court.—*Moulton vs. Holmes*..... 225

In such case the executor is bound to act as a discreet person would act were the debt his own.—Id.

Section 1588 of the Code of Civil Procedure is not restrictive of the common law powers of executors, but is intended to afford them additional protection, when acting in good faith, in the exercise of their common law powers.—Id.

TITLE—WHEN VESTS IN—The legal title under a patent issued to one as executor vests in him, and on conveyance by him it is immaterial whether he executes the instrument in his representative or his individual capacity.—*Christy vs. Fisher*..... 598

See **TRUST; ESTATES OF DECEASED PERSONS**.

FALSE REPRESENTATIONS—See **REMISSION OF CONTRACT**.

FEES—The failure of a Court clerk to demand his fees in advance, upon the receipt of demurrers for filing, is a waiver of prepayment of the fees, which waiver the clerk has power to make.—*Tregambo vs. Comanche M. and M. Co.*..... 636

In such case the demurrers are in contemplation of law on file, and indorsement of filing is unnecessary.—*Tregambo vs. Comanche M. and M. Co.*..... 636

See **CLERK OF COURT; SHORT-HAND REPORTER**.

FELONY—There is no such distinctive crime as felony. There are several crimes, any one of which is felony.—*People vs. Nelson*..... 596

FILING PAPERS—Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office.—*Tregambo vs. Comanche M. and M. Co.*..... 636

FINDINGS—CONTEST OF WILL—Where, on the contest of a will on the ground that a testator was not of sound and disposing mind, there was testimony that for twenty years he had been addicted to the excessive use of intoxicating liquor, and was "a noted drunkard," but there was some evidence that he was of sound and disposing mind; and the Court below found in favor of the proponent: Held, that the finding should not be disturbed on appeal.—*Johnson vs. Rice*..... 104

- EJECTMENT**—In ejectment against a railroad company, where the company had condemned a different line of way and paid the price fixed, and there was judgment for the company, but the findings did not show whether or not the money paid was for the line as occupied, or whether or not the alleged license or permission of the owner to the use of the line occupied was a revokable one; the findings did not cover the issues or justify the judgment.—*Robinson vs. Pittsburg R. R. Co.*..... 161
- POWER OF COURT**—The Judge of the trial Court is not bound to adopt the findings prepared by either party, but may adopt, modify or reject them, or himself prepare the findings.—*Porter vs. Woodward*..... 387
- PRACTICE**—A party requiring a finding upon a particular point must specify the point without dictating the terms of the finding.—*Id.*
- If a case is tried in one county and the judge prepares findings in another and transmits them to the county where the case was tried, to be there filed, the judgment is not void.—*Comstock Q. M. Co. vs. Superior Court*..... 499
- A cause tried by the Court is not determined till the findings and order for judgment are filed with the clerk of the Court in which the action is tried.—*Comstock Q. M. Co. vs. Superior Court*..... 499
- A judge is not bound to deliberate upon or prepare findings and order judgment in the county in which an action is tried.—*Id.*
- CONFLICT OF EVIDENCE**—Findings will not be disturbed where the evidence is substantially conflicting.—*McCourtney vs. Fortune*..... 541
- OMISSION TO FIND**—A judgment will not be reversed for want of finding, if the appellant is not prejudiced by the failure to find.—*Id.*
- WHEN NOT NECESSARY**—A finding upon the plea of the Statute of Limitations is not necessary where it appears that the plaintiffs were not, on the day claimed or at any other time, the owners in fee simple absolute, nor entitled to the possession of the premises in dispute.—*Id.*
- Where no issue is raised upon the Statute of Limitations, a finding upon the statute is not required.—*Blackford vs. Whistler*..... 785
- SUFFICIENCY OF**—A finding "that no part of said judgment and decree has ever been appealed from, set aside or paid," and "that the balance of said notes with interest remains unpaid," is sufficient to show that the judgment and notes have not been paid.—*Turner vs. Mahoney*..... 779
- TITLE TO LAND**—A finding that "neither the plaintiff nor his, nor any or either of his predecessors or grantors, or those under whom he claims, ever were in or had possession of any part of the land described in the complaint, which is described in the answers of the defendants, or of which said defendants were in possession when the action was commenced" is a finding of fact from which the conclusion of law follows that plaintiff never had a title.—*Porter vs. Woodward*..... 387
- If plaintiff has no title it is immaterial whether the facts found show a defense of the Statute of Limitations or not.—*Porter vs. Woodward*..... 387
- See PROBATE; PROCEDURE.
- FINE**—See CONTEMPT.
- FISH LAW**—Plaintiff rented boats and fishing-tackle to Chinese fishermen, who were using them at a distance of more than one-third way across a slough in Solano County: Held, that such use was a misdemeanor, and the boats and fishing-tackle were subject to forfeiture.—*Hay Sing Yeck vs. Anderson*..... 630
- See FORFEITURE.
- FORCIBLE ENTRY**—In an action of forcible entry or forcible detainer under the Code of Civil Procedure, it is improper to allow in evidence the title deeds of defendant.—*Voll vs. Hollis*..... 725
- In such actions title is not in issue and the question of good faith cuts no figure.—*Id.*
- FORECLOSURE**—APPOINTMENT OF RECEIVER—Section 564 of the Code of Civil Procedure authorizes the appointment of a receiver in an action to foreclose a mortgage, when it appears that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.—*La Societe Francaise vs. Selheimer*..... 115

- ESTOPPEL**—A, being in possession of and claiming a Spanish grant, conveyed it for a nominal consideration to B, his father-in-law, living in Rhode Island; and B, after the grant was rejected, acquired title by purchase from the United States under the Act of Congress of March 3, 1865, but continued to reside in Rhode Island, while A continued to reside on the land with his family. Just before acquiring his patent B appointed C, a son of A, his attorney in fact, with power to sell or mortgage the land. There being a doubt whether C could execute a note as well as a mortgage under the power, he executed a deed to a fourth person, who executed a note and mortgage of the land, and then conveyed to B, the father-in-law, who acquiesced in the transaction. Afterwards, upon the note and mortgage falling due, C, as attorney in fact of B, under the original power, executed a second deed of conveyance of the land to D, another son of A, who thereupon executed a note and mortgage to E in consideration of moneys advanced by him to pay off the former note and mortgage, and to furnish A and his family the money required by them, of all of which B was cognizant soon after the transaction and made no objection: Held, that in equity the judgment foreclosing the second mortgage should be affirmed, even though C had no power to convey the land without consideration; or to convey the after-acquired title; or that the acquiescence of B was not by deed or writing.—*Ayres vs. Palmer* . . . 184
- ACTION PREMATURE**—A mortgage given to secure payment of a note and interest, the interest payable monthly, which contains no stipulation for foreclosure in default of payment of interest, cannot be foreclosed prior to maturity of the note.—*Brodrigg vs. Tibbets* . . . 435
- If neither the note nor mortgage contains a stipulation that in case of default in payment of interest the mortgage may be foreclosed, a foreclosure cannot be had previous to maturity of note.—*Brodrigg vs. Tibbets* . . . 671
- JUDGMENT FOR DEFICIENCY**—Where defendant executed a deed absolute, intended as a mortgage, and it was proved that he promised plaintiff payment of money secured, by evidence dehors the deed, the plaintiff was entitled to a judgment order for the deficiency.—*Jones vs. Gardner* . . . 440
- INTEREST**—It is not error to decree the payment of interest in accordance with the contract of the parties.—*Id.*
- A plea by defendant that it would be to his disadvantage to have separate lots sold in gross raises an immaterial issue.—*Id.*
- INTERVENTION**—A acquired, upon execution sale, all the right, title and interest of B in and to a contract of purchase of real property. Subsequently defendants succeeded B, and to them the owner of the legal title conveyed it. Defendants mortgaged to plaintiffs; the latter brought a suit of foreclosure, in which A intervened: Held, that the defendants should be allowed the amount paid by them to complete the purchase under the contract of sale; that the intervenor should pay such amount into Court for them, to be applied in satisfaction of the mortgage debt to plaintiffs; that upon such payment the mortgage be canceled, the intervenor awarded the land, and plaintiffs decreed entitled to a money judgment over against the defendants for any balance remaining due upon the mortgage debt; otherwise that plaintiffs be entitled to a decree of foreclosure against defendants and intervenor.—*Fish vs. Fowle* . . . 502
- RIGHT TO REDEEM**—A mortgagee who had foreclosed his mortgage and had the property sold and judgment docketed for the deficiency is not entitled to redeem from one who has redeemed it under a judgment lien from the purchaser at the foreclosure sale.—*Black vs. Gerichten* . 746
- EQUITY OF REDEMPTION**—In consideration of the conveyance of an equity of redemption, the grantees covenanted that on foreclosure no personal judgment should be entered against the mortgagor. After foreclosure a judgment for deficiency was entered, and it not appearing that plaintiff or her assignor paid the amount of the judgment, the plaintiff was entitled to recover the amount of the personal judgment.—*Barfield vs. Marks* . . . 763
- SEPARATE MORTGAGES**—One of the defendants executed a mortgage to the plaintiff's assignor upon several tracts of land, two of which he had

- previously mortgaged to his co-defendant on record at the date of plaintiff's mortgage. Upon a foreclosure by plaintiff, the whole of the property should be sold—that portion not embraced in the mortgage to the co-defendant to be first sold, and the proceeds paid over to the plaintiff, the surplus to be paid to subsequent purchasers from defendant. If there should not be sufficient to pay plaintiff, the tracts mortgaged to the co-defendant should then be sold, the plaintiff to receive the surplus, after paying co-defendant's debt, towards paying plaintiff's mortgage, the balance to be paid to subsequent purchasers from the mortgagor.—*Brooks vs. Rice*. 772
 See EQUITY; MORTGAGE.
- FORFEITURE—CONSTITUTIONAL LAW**—A forfeiture of property cannot be enforced without judicial proceedings had for the purpose of determining whether it is liable for condemnation.—*Hey Sing Yeck vs. Anderson*. 630
 The owner is entitled to notice of the charge for which the forfeiture is claimed and of the time and place of determination thereof.—*Id.*
 Where a constable seized property as being subject to forfeiture, the owner not knowing the unlawful use to which it was put: Held, that he could not be deprived of his property without judicial proceedings, and that he was entitled to maintain an action of claim and delivery for the property so taken.—*Hey Sing Yeck vs. Anderson*. 630
 See BAIL BOND; FISH LAWS.
- FORMER ACTION PENDING**—In an action to recover money upon a written contract, the complaint contained in addition to the allegations of a complaint in a former action, an allegation of delivery of a deed to which plaintiff had no title: Held, that if delivery of the deed was not a condition precedent to plaintiff's right to maintain the action, the former action was a bar, but if not it was ineffectual—such deed being a nullity.—*Montgomery vs. Harrington*. 777
 See DEED; CONDITIONS PRECEDENT.
- FORMER ADJUDICATION**—Where the rights of the parties are fully determined in action the adjudication is conclusive.—*De Halpin vs. Oxarart*. 730
 See SAN FRANCISCO; STATE LANDS.
- FRANCHISE**—See TAXATION.
- FRAUD**—Where members of an insolvent firm, with intent to defraud firm creditors, conspired with a person to whom the firm was indebted in only a small amount to have an attachment levied on the firm property, and a judgment to be taken upon fictitious and ante-dated firm notes fabricated for the purpose, and to transfer to him all the firm property then *in transitu*, and for which the firm held bills of lading; and, in pursuance of such conspiracy, judgment was recovered, the firm property sold on execution and bid in by the plaintiff in the collusive suit, and the remaining property of the firm secretly transferred to him: Held, that he was liable to the assignees in bankruptcy, as representative of the firm creditors, for the value of all the firm property so fraudulently obtained by him, and will be decreed a trustee of such property and of its proceeds for the benefit of the firm creditors represented by the assignee.—*Shainwald vs. Lewis*. 305
 See EQUITY; EXECUTORS AND ADMINISTRATORS; REVERSION OF CONTRACT.
- FUNDING ACTS**—The Act "to add five new sections to the Political Code, providing for funding and refunding county indebtedness" is a general and not a local act; and is not in conflict with the Constitution.—*University of California vs. Benard*. 88
 See CONSTITUTIONAL LAW; STATE FUNDS.
- GAMBLING**—There is no statute prohibiting a game not played for value.—*Ex parte Bernert*. 460
 Judicial notice will not be taken that the game of "pool" necessarily involves gaming for money.—*Id.*
- GOODS SOLD AND DELIVERED**—See PRACTICE; SALE AND DELIVERY.

- GUARDIAN AND WARD**—In an action against the guardian of an insane person and the sureties on his official bond for the amount found due by him on final settlement of his account in the Probate Court, a cross complaint set up by defendants that at the time he presented the final account and report of his guardianship, he was in such a condition, physically and mentally, as rendered him legally incompetent to make and render an account of his trust, and to transact any business; and praying the account as settled be set aside, and that the account be reopened for final settlement does not state facts sufficient to entitle defendants to relief.—*Brodrribb vs. Brodrribb*. 64
- FUNDS OF ESTATE**—A guardian is responsible for funds of the estate loaned without security.—*Estate of Post*. 287
- CONSENT TO JUDGMENT**—The consent of the guardians to the entry of judgment against the infants did not entitle them to notice of judgment before moving for a new trial.—*San Fernando F. H. Asso. vs. Porter*. 791
- A judgment against an infant is not void if entered with his guardian's consent.—*San Fernando F. H. Asso. vs. Porter*. 791
- HABEAS CORPUS**—If the return to a writ of habeas corpus shows that petitioner is held under a void judgment, the prisoner cannot be restrained of his liberty by virtue of the warrants issued at the time of the commencement of the proceedings upon which such void judgment is based.—*Ex parte Bernert*. 460
- HEIR**—A child born out of wedlock and not legitimized is entitled to inherit from its mother.—*Estate of Wardell*. 431
- ALIENS**—Under the laws of Mexico, in force in California February 14, 1850, aliens could inherit real estate. *Paty vs. Smith*, 50 Cal. 153, followed.
- RIGHT OF ACTION**—The adoption of Section 1452, Code of Civil Procedure, giving heirs a right of action did not affect the operation of the statute of limitations which had already commenced to run against the heir.—*Crosby vs. Dowd*. 736
- See **ESTATES OF DECEASED PERSONS**.
- HOMESTEAD**—**ACTUAL RESIDENCE**—To render a declaration of homestead effectual the claimant must actually reside on the premises when the declaration is filed; and that therefore there was no valid additional homestead lot.—*Aucker vs. McCoy*. 19
- RIGHT TO, CONSTRUED**—A homestead right is not a right which vests under the law by succession; it is for the benefit of the widow and children.—*Estate of W. H. Moore*. 299
- SETTING APART**—It is immaterial that the petition for setting apart the homestead was filed on behalf of the widow alone, as the Court will protect the interests of the minor children.—*Id.*
- SALE OF**—Where a Constitution made provision that homesteads should not be subject to forced sale, etc., and a husband, under this provision, executed a deed of a homestead and took back a defeasance, thereby constituting a mortgage, and the grantee commenced ejectment in the U. S. Circuit Court, and claimed that the deed passed the legal title: Held, that the form of procedure did not apply, and that forced dispossession in ejectment was within the provision of the Constitution.—*Lanahan vs. Sears*. 213
- DECLARATION OF**—A homestead declaration filed by a married woman must state that it was for the joint benefit of herself and husband, and that the husband had not acquired a homestead.—*Booth vs. Galt*. 603
- See **CONVEYANCE**.
- HOMICIDE**—A bare trespass on property does not justify nor excuse homicide.—*People vs. Flannagan*. 675
- JUSTIFIABLE HOMICIDE**—The combination of intent and endeavor to commit a felony by the deceased is not necessary in order to make out a case of justifiable homicide. Either the intent or endeavor is sufficient.—*Id.*
- See **SELF-DEFENSE**.
- IMPRISONMENT**—SEE **CONTEMPT**.

- INDICTMENT—GRAND LARCENY**—Where an indictment charged defendant with the crime of grand larceny, and that he had been indicted, tried and convicted of grand larceny, followed by the evidence of an indictment for grand larceny: Held, that the "register of criminal actions," of the county, showing a former conviction of defendant of another offense is sufficient evidence to go to the jury.—*People vs. Garcia*..... 482
- DISINTERMENT**—The said E. D., on etc., at etc., without authority of law, disinterred and removed from its place of sepulture, at etc., the dead body of the late E. L., a human being; the said dead body not being the dead body of a relative or friend of the said E. D., contrary, etc., sufficiently charges the defendant with the violation of sepulture, under Section 290 of the Penal Code.—*People vs. Dalton*..... 757
- INFORMATION**—An information need not contain any averments with reference to the examination of defendant before a committing magistrate.—*People vs. Shubrick*..... 41
- SUFFICIENCY OF**—An information is sufficient if it substantially states the facts, however inartificially it may be drawn.—*People vs. Clarke*.... 177
- PREVIOUS CONVICTION**—A charge of previous conviction may be made in an information as well as in an indictment, and the same rules of procedure apply.—*People vs. Carlton*..... 108
- INHERITANCE**—See **EQUITY; ESTATES OF DECEASED; HEIR; WILL.**
- INJUNCTION—ENFORCEMENT OF JUDGMENT**—In an action to enjoin the enforcement of a judgment on the ground that it had been entered after payment of the claim, and that it had been obtained by fraud, there being evidence that the judgment had been regularly entered pursuant to a stipulation, the Court properly refused to enjoin its enforcement.—*Ladd vs. Samuels*..... 442
- STAY REPAIR OF LEVEE**—Injunction will not lie to stay the repair of a levee within a district on the ground that a portion of the assessable property had been omitted from the assessment list, it not appearing but that there was already collected sufficient money to defray the expenses of the repair.—*Hoke vs. Perdue*..... 680
- In contemplation of law, an injunction does not injure a party—his rights being secured by the injunction bond.—*Bliss vs. Superior Court*..... 704
- See **PUBLIC LANDS; REMOVAL OF CAUSES; SWAMP LANDS; TAXATION.**
- INSANE PERSONS**—See **GUARDIAN AND WARD.**
- INSANITY**—On a trial involving the question of insanity, it is error to admit hearsay testimony that the party had been treated for softening of the brain.—*Sexton vs. Sexton*..... 784
- SOFTENING OF THE BRAIN**—Insanity may result from softening of the brain, but the fact must be shown by experts and not by hearsay evidence.—*Sexton vs. Sexton*..... 784
- See **GUARDIAN AND WARD; INSTRUCTIONS.**
- INSOLVENCY**—Where in insolvency proceedings the assignees received certain moneys which belonged to the insolvent from the sheriff, and after trial which resulted in the insolvent being denied the benefit of the insolvent acts, an order was made requiring the assignee to return the money to the sheriff; in the absence of a showing of further facts, the order was correct.—*Appel vs. His Creditors*..... 183
- SUSPENSION OF ACT**—It was competent for the Legislature to pass an insolvent act, while the United States Bankrupt Act was in force, but the operation of such act was suspended until the repeal of the Federal law.—*Seattle Coal and T. Co. vs. Thomas*..... 199
- NOTICE TO CREDITORS**—In insolvency proceedings the statute requires that notice to creditors shall be published at least once a week for four successive weeks, and an interval of one week must elapse between each publication in order to give the Court jurisdiction, and the affidavit must disclose such fact.—*Hernandez vs. His Creditors*..... 370
- MEETING OF CREDITORS**—An order fixing the time for meeting of creditors and directing notice was made on May 21, 1879. The time fixed for the meeting was June 23d, 1879. Publication of the notice on May 23d and 30th, June 6th and 13th was sufficient.—*Steele vs. His Creditors* 485

NOTICE—The judge of the Court is not the person to name the paper in which publication of notice is to be made; he simply fixes the time and directs notice to be given and the clerk gives the notice.—*Id.*

RECEIVER—The Insolvency Court has no power to order attached property to be delivered to a receiver.—*Von Rounn vs. Superior Court.*... 429
See **FRAUD**; **PRACTICE**.

INSOLVENT ACT—See **VERIFICATIONS**.

INSTRUCTIONS—REFUSAL OF—Where a legal principle has been once announced by the Court it is not error to refuse to give it a second time in the form of an instruction.—*People vs. Ramirez.*... 4
Instructions not predicated upon the evidence in the case may be refused.
—*Id.*

PRACTICE—The omission of a Court to mark instructions "refused," which are refused, if an error, is immaterial and could not prejudice defendant.—*Id.*

If the law be correctly given in the charge to the jury, the Court may refuse to give an instruction on the same subject, setting forth, in extent, the reasons of the principle of the law.—*Id.*

Where an instruction asked is too broad the Court is justified in refusing to give it.—*Benninger vs. Phoenix Ins. Co.*... 557

MEDIATE CAUSE OF DEATH—Where the Court instructed the jury that if from the evidence they found that the "mediate cause" of death was the wounds, then the fact of being thrown into the water after infliction of the wounds was of no consequence: Held, a proper submission to the jury.—*People vs. Ah Luck.*... 13

INSANITY—Where, in a murder case, the Court gave part of an instruction asked by the defendant, to the effect that "if at the time of commission of the act his mind was so disordered or diseased that he was incapable of distinguishing good from evil, right from wrong, he was irresponsible and should be acquitted," and refused that "further if the person was in this condition a short time before the commission of the act, the presumption is that he was insane when he committed it:" Held, that the refusal was correct.—*People vs. Smith.*... 132

VERBAL STATEMENTS—The verbal statement of the judge that the jury has nothing to do with the punishment is not error, nor within the rules requiring instructions to be in writing or taken down by the phonographic reporter.—*People vs. Jackson.*... 401

CREDIBILITY OF WITNESS—As to the doctrine of instructing as to the credibility of defendant as witness.—*People vs. Cronin, 34 Cal. 191, affirmed; People vs. Nichols.*... 436

The credibility of witnesses is for the jury to determine.—*Spearman vs. California Street R. R. Co.*... 544

REASONABLE DOUBT—The instruction, "before conviction the persuasion of guilt produced by the evidence ought to amount to almost a certainty, or such a moral certainty as convinces the minds of the jury as reasonable men," while unsatisfactory is not erroneous.—*People vs. Beck.*... 628

SELF-DEFENSE—Where instructions are given to the effect that if the jury believe from the evidence that deceased assaulted defendant with a deadly weapon they should consider the intent with which the assault was made, and if they should find there was reasonable grounds for apprehending that assailant designed to commit a felony or do defendant some great bodily injury, and that there was imminent danger, and that defendant acted alone under fear of such design being accomplished, then they should find him justified: Held, that the Court should further define what constituted a deadly weapon on an instruction asked by the jury.—*People vs. Fuqua.*... 789

DUTY OF JURORS—Jurors must follow the instructions of the Court as to the law, whether right or wrong, or the verdict will be set aside.—*Aguirre vs. Alexander.*... 793

PROVINCE OF JUDGE—It is the office of the judge to instruct the jury on points of law, and of the jury to decide on matters of fact.—*Id.*

MUST BE PERTINENT TO ISSUES—Instructions not pertinent to the issues should not be given, even though, as abstract legal propositions, they are correct.—*Id.*

- CONTRADICTIONARY**—It is error to give contradictory instructions to the jury.
—*Id.*
Instructions to a jury in which a conflict is alleged, relating to matters not properly before them, does not entitle an appellant to a reversal.
—*Estate of Gharky*..... 561
- PREPONDERANCE OF EVIDENCE**—The instruction "that unless defendant shows by a preponderance of evidence that plaintiff was not a purchaser in good faith and for a valuable consideration of the property in controversy they must find for plaintiff:" Held, that the instruction in effect took from the jury the consideration as to whether the property had belonged to the assignor of plaintiff.—*Smith vs. Arnold*..... 148
See **APPEAL**; **EQUITY**; **NEW TRIAL**.
- INSURANCE POLICY**—The "application" referred to in an insurance policy is a part of the policy, and a breach of its conditions avoids the policy.—*Roberts vs. Aetna Ins. Co.*..... 539
- INTEREST**—Interest upon a claim for services rendered and money expended, runs from date of the claim becoming due.—*Mix vs. Miller*..... 540
See **JUDGMENT**.
- INTERLOCUTORY DECREE**—Where an interlocutory decree was amended more than six months after its entry, so as to make it conform to the finding and judgment of the Court, these being matters of record, the Court may make the amendment.—*Beatty vs. Dixon*..... 134
See **EQUITY**; **JUDGMENT**.
- INTERVENTION**—See **PUBLIC LAND**.
- IRRIGATION—SUPERINTENDENT OF**—The Superintendent of Irrigation under the Act of March 10, 1874, was not a county officer; he was an officer of such portions only of the county as were formed into irrigation districts, and was to be paid out of water rates collected from such districts.—*Knox vs. Supervisors of Los Angeles Co.*..... 809
The Act to promote irrigation in the county of Los Angeles (Stats. 1873-4, p. 312), and the Act for the relief of George C. Knox (Stats. 1877-8, p. 181), conflicts with Art. XI, Sections 4 and 13, and Art. 1, Section 11 of the Constitution of 1849.—*Id.*
See **WATER**.
- JUDGMENT—WHAT IS NOT**—An order directing a judgment to be entered is not a judgment.—*Schaefer vs. French Sav. and L. Society*..... 155
Where the law prescribes that the penalty for a certain offense shall not be less than a fine of \$100, the Court has no power under the Act to render a judgment in a less sum than \$100, and a judgment adjudging defendant to pay a fine of twenty dollars is absolutely void, and the prisoner is entitled to his discharge notwithstanding the punishment was more favorable than that authorized by law.—*Ex parte Bernert*..... 460
- VALIDITY OF**—That a Court has jurisdiction over a person and the offense charged, and its punishment is not an infallible test of the validity of a judgment rendered by it.—*Ex parte Bernert*..... 460
- ON DEMURRER**—A defendant is entitled to final judgment, in case a demurrer is sustained upon the ground that facts stated do not constitute a cause of action.—*Mora vs. Leroy*..... 633
- BY DEFAULT**—A judgment by default, entered after a demurrer has been filed, is premature.—*Tregambo vs. Comanche M. and M. Co.*..... 636
- AGAINST INFANT**—A judgment against an infant is not void if entered with his guardian's consent.—*San Fernando F. H. Assn. vs. Porter*... 791
Partition having been made in compliance with an interlocutory decree and having been approved by this Court, the guardians of the infants were authorized to consent to the entry of judgment.—*Id.*
See **FORECLOSURE**; **GUARDIAN AND WARD**; **HABEAS CORPUS**; **STATE LANDS**.
- JUDICIAL NOTICE**—See **GAMBLING**.
- JUDICIAL OFFICERS**—Judges of Courts of record, of superior or general jurisdiction, are not liable to civil actions for their judicial acts, even when in excess of their jurisdiction and are alleged to have been done corruptly and maliciously.—*Pickett vs. Wallace*..... 117

If a judicial officer is about to exceed his jurisdiction the party threatened may stay proceedings by prohibition; if he renders judgment in a case beyond his jurisdiction his judgment may be annulled by certiorari; and if the judgment imposes imprisonment the prisoner may be discharged on habeas corpus.—*Heurstal vs. Muir*..... 22
See JUSTICES OF THE PEACE.

JURISDICTION—AMOUNT OF CONTROVERSY—Section 383 of the Code of Civil Procedure only permits persons severally liable on "the same obligation or instrument, including the parties to bills of exchange and promissory notes," to be joined as defendants in the Superior or Justices' Courts, as the amount involved may give jurisdiction to the one or the other of those Courts.—*Thomas vs. Anderson*..... 570

DISTINCT PROMISES—Several and distinct promises by various defendants to pay sums of money as a reward cannot confer jurisdiction on the Superior Court, if neither of the sums promised equals the amount necessary to give the Court jurisdiction.—Id.

The Supreme Court has no jurisdiction to try the title to an office.—*People ex rel. Danielwitz vs. Harvey*..... 230
See CONTEMPT; SUPREME COURT.

JUSTICES COURTS—PLEADING IN—Where a title was derived through an action in a Justices Court on a complaint against a husband and wife, alleging that the wife purchased merchandise of the value and for which she agreed to pay \$242.29, on delivery, that the merchandise was delivered to her, that afterwards she married, and asking judgment against both for the sum agreed on: Held, that the want of averments of sale and delivery at request of defendants, or that either was indebted to plaintiff was a fault in pleading, which might have been reached by demurrer; but it did not affect the jurisdiction which the Court had of the cause of action and of the parties; and that, therefore, the judgment of the Justices' Court was not void.—*Ancker vs. McCoy*..... 19
Pleadings in Justices' Courts are to be liberally construed.—*Lataillade vs. Santa Barbara Gas Co.*..... 601

JUSTICES OF THE PEACE—Justices of the Peace are judicial officers within the meaning of the New Constitution providing that such officers shall be elected at the time and in the manner that State officers are elected.—*People ex rel. Pennie vs. Ransom*..... 187

ELECTION OF—Justices of the Peace are to be elected on the even numbered years.—Id.

The Act of April 1, 1880, amending the Code of Civil Procedure is constitutional, and as regards the duties of the Justices of the Peace it is neither a local nor special but a general law.—Id.

See CONSTITUTIONAL LAW.

LAND PATENT—See EVIDENCE; PUBLIC LAND.

TITLE—LANDLORD AND TENANT—See EVIDENCE; UNLAWFUL DETAINER.

LAW OF THE CASE—The ruling of the Court on a former appeal is the law of the case.—*Whittenbrock vs. Belmer*..... 760

LEASE—See EVIDENCE.

LEGISLATURE—See WRIT OF PROHIBITION.

LIBEL—A complaint upon matter libelous per se, must show that the party receiving the communication knew that plaintiff was the person referred to in it, the Code does not do away with the necessity of such an averment.—*De Witt vs. Wright*..... 602

LICENSES—The Act of March 23, 1878, does not operate a repeal of provisions of the Act of March 30, 1872, authorizing the Board of Supervisors to fix the sum to be paid by the different trades, except to the extent of the particular trades specified in the act.—*Ex parte Bernert*..... 460

POOL TABLES—The ordinance passed relative to taking out licenses for pool tables requires only those parties to take out licenses who make a business of keeping pool tables for profit.—*Ex parte Bernert*..... 460

LIENS—See PRIORITY OF LIENS.

LOS ANGELES—See CITY OF LOS ANGELES.

- MANDAMUS**—Where a petition for a writ of mandamus to compel the Board of Supervisors of Colusa County to proceed in the reclamation of swamp and overflowed lands, state that the lands to be reclaimed were situated partly in Colusa County and partly in Yolo County; a demurrer thereto was properly sustained, and on plaintiff declining to amend by stating in which county the particular land was situated, that judgment for defendant was correct.—*Cosner vs. Board of Supervisors*..... 77
- CODE CONSTRUED**—Section 1088 of the Code of Civil Procedure, the writ of mandamus could not be granted on a mere default; that the cause should have been heard, whether the adverse party appeared or not, and that the judgment under the circumstances was erroneous.—*People ex rel. Comm. of Transp. vs. Central Pac. R. R. Co.*..... 111
- TO RAILROAD CORPORATIONS**—Where the Act of April 3, 1876, requiring railroad corporations to furnish certain information to the Commissioners of Transportation, was repealed without exception or reservation by the Act of April 1, 1878, whereby the Commissioners of Transportation ceased to exist; and it appeared that an application for mandamus to compel the furnishing of such information was pending on appeal from a judgment ordering a writ to issue at the time of such repeal: Held, that the proceedings should be dismissed.—*Id.*
- STAY OF PROCEEDINGS**—Where a District Court improperly granted a stay of proceedings in an action pending, it may be compelled by mandamus from the Supreme Court to proceed with the trial of the cause.—*Avery vs. Superior Court*..... 174
- Mandamus lies only where there is a clear legal right to have a specific thing done by a public tribunal or officer upon whom the law has imposed the duty of doing it.—*Spring Valley W. W. vs. Board of Supervisors*..... 614
- FROM SUPREME COURT**—Mandamus will not issue from the Supreme Court in a proceeding commenced in the County Court to try the title to an office.—*People ex rel. Danielwitz vs. Harvey*..... 230
- WHEN WILL NOT LIE**—Mandamus will not lie where the party has a plain, speedy and adequate remedy by appeal.—*Clark vs. Crane*..... 412
- The writ will not issue where the effect of granting it would be to do a vain and useless thing.—*Id.*
- Mandamus will not lie to a County Treasurer to compel him to pay out money upon a certificate signed by a Justice of the Peace for reporter's fees.—*Fox vs. Lindley*..... 580
- Mandamus will not lie to compel the Judge of the Court below to fix the amount of a bond to stay proceedings pending appeal from an order granting a writ of execution it appearing that the judgment had been already affirmed on appeal.—*Barthold vs. Sullivan*..... 582
- Mandamus will not lie to compel a Board of Supervisors to approve a warrant drawn by the trustees of a reclamation district.—*Cosner vs. Board of Supervisors*..... 739
- TRIAL IN DUE COURSE**—Mandamus lies to compel the Court below to proceed to the trial of an action in due course.—*Dunphy vs. Belden*.. 701
- See **PUBLIC LANDS**.
- MARINE INSURANCE**—It is an implied condition, in an insurance policy, that the ship named in it shall not, after the commencement of the risk, be changed without necessity or the consent of the insurer.—*Schroeder vs. Schweizer Lloyd Transp. Versicherungs Gesellschaft*.. 527
- By the fact that a given ship is named in the policy, the insurer has a right to say that he had some peculiar reasons for insuring a risk on that very ship, which should not apply to any other.—*Id.*
- The necessity which will justify a change of ship, on the part of the master only arises in case the ship is disabled by stress of weather or other peril of the sea.—*Id.*
- The word "connections," in a policy of insurance, where goods are insured from place to place on board a steamship and its connections, has reference to a state of things existing at the time of execution of the policy.—*Id.*
- Where it had been the custom of the ship-owner to carry goods from San Francisco to Batavia, without transshipping at Yokohama but to

- carry them to Hongkong and there tranship them, the latter port was the "connection" referred to in the policy.—*Id.*
- By reason of the word "connection" in the policy the plaintiffs were put upon inquiry as to the connections of the steamship, and while evidence was admissible to show the meaning of the word plaintiffs could not be allowed to show that they did not know what such meaning was.—*Id.*
- MARRIED WOMEN**—A mortgage executed by a married woman, in the mode prescribed by law, cannot be avoided by her intention not disclosed to the mortgagee.—*Stewart vs. Whitlock*..... 478
- Since the amendment to Section 167, C. C., a married woman has power to execute a note and mortgage.—*Brickell vs. Flourney*..... 731
- MAYHEM**—Biting off the ear of a human being is mayhem.—*People vs. Golden*..... 640
- MESNE PROFITS**—A person entering into the possession of lands with knowledge of the rights of the owner is responsible for mesne profits.—*Hidden vs. Jordan*..... 367
- In an action for mesne profits, such portion of the profits as accrued prior to entry of decree in equity could not be recovered, as the decree should, in the action, have fixed the rights of the parties.—*Id.*
- See **EJECTMENT**.
- MECHANIC'S LIEN**—See **PRIORITY OF LIENS**.
- MEXICAN GRANT**—The final decree of the Board of Land Commissioners upon a Mexican grant, affirmed by the District and Supreme Courts of the United States, and the patent issued thereon, are conclusive as between the United States and the claimant in the proceeding.—*Steinbach vs. Perkins*..... 559
- JURISDICTION**—The Commissioners and the United States Courts having had jurisdiction to determine what land was embraced within a petition, their determination that the claimant was entitled to the lands necessarily determined that such lands were embraced within the petition.—*Id.*
- PETITION**—Where the petition on application for a patent was introduced in evidence and the transcript on appeal did not contain a copy of it or state its contents, that the finding of the Court below that the petition did include the lands would not be disturbed.—*Id.*
- MINING CORPORATIONS**—Stockholders of mining corporations, organized under the Code, incurred no liability ex contractu, to pay in either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares.—*In re South Mount. Consol. M. Co.*..... 748
- ASSESSMENTS**—Unless such stockholders have subscribed for stock or are successors to the subscribers, assessments levied on them can only be enforced by the sale of their shares.—*Id.*
- The Civil Code does not create, and was not intended to create, any personal liability for assessments, unless from the terms of their subscription such liability was incurred.—*Id.*
- The remedy of the creditor against the stockholder, personally, is limited and defined by Section 322 of the Code, and his liability cannot be extended beyond these limits.—*Id.*
- See **CORPORATIONS**.
- MISJOINDER OF PARTIES**—Objection to misjoinder of parties defendant, not apparent on the face of the complaint, must be taken advantage of by answer.—*Carroll vs. Storck*..... 267
- MONEY HAD AND RECEIVED**—See **TITLE**.
- MORTGAGE**—A mortgage containing the clause, "meaning to convey all the right, title, interest, claim and demands and inheritance as heir of the late F. M. Castro," simply conveys the interest that the mortgagor had as heir of deceased.—*Sherman vs. McCarthy*..... 719
- SUBSEQUENT TITLE**—A title subsequently acquired by a mortgagor to the benefit of the mortgages.—*Id.*
- SECOND MORTGAGE**—Where a second note and mortgage did not provide for a foreclosure in default of payment of interest, but did provide

- that interest should be added to the principal, a foreclosure could not be had before the maturity of the note.—*Brickell vs. Batchelder*. 733
- STOCK PLEDGED**—Where stock was pledged in addition to the execution of a mortgage, as part of the same transaction, and the pledgor was subsequently declared bankrupt, there being no fraud in the pledging of the stock, the assignee in bankruptcy was not entitled to it, but it should be sold to reduce the mortgage lien.—*Whittenbrock vs. Belmer* 760
- MERGER**—A mortgage is merged in the judgment of foreclosure, and the only lien the mortgagee has, after the sale and a docketing of a deficiency judgment, is by virtue of such docketed judgment.—*Black vs. Gerichten*. 746
- ESTATE OF MORTGAGOR**—The estate of a mortgagor is a legal estate.—*Barfield vs. Marks*. 763
- ON COMMON PROPERTY**—A mortgage upon common property executed by the surviving widow only affects the undivided interest of the widow.—*Aguirre vs. Alexander*. 798
- Purchasers under foreclosure of such mortgage only succeed to the widow's interest and become tenants in common with the heir of deceased husband.—*Id.*
- See **EQUITY**; **FORECLOSURE**; **MARRIED WOMEN**; **PRIORITY OF LIENS**; **STATE CLAIM**; **TITLE**.
- MURDER**—Murder in the second, as well as in the first, degree is the unlawful killing with malice aforethought, and an instruction that such killing is murder in the first degree is erroneous.—*People vs. Grigaby*. 771
- CAUSE OF DEATH**—Where the deceased was shot and cut upon a bridge and then thrown into the river, and it appeared that the wounds would necessarily produce death, but the witnesses could not tell whether death was produced by the wounds or the drowning, the evidence was sufficient to justify a verdict of murder in the first degree.—*People vs. Ah Luck*. 13
- See **INSTRUCTION**.
- NEGLIGENCE**—Where the defendant, a common carrier, had agents for the purpose of receiving goods at the terminal point of the route, and through their negligence the goods were lost, the defendant was liable.—*Dresbach vs. Cal. Pac. R. R. Co.*. 656
- LIABILITY OF RAILROAD**—Where the evidence supports the finding that the railroad route extends to a certain terminal point on the route, the company will be liable for loss by negligence at such point.—*Id.*
- LIABILITY OF OWNERS OF LAND**—The owner or occupant of land who by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation.—*Bennett vs. Louisville and N. R. R. Co.*. 448
- See **DAMAGES**.
- NEW TRIAL**—A failure to find according to the facts, and finding facts against the evidence, is ground for a new trial.—*Moulton vs. Holmes*. 225
- DISCRETION OF COURT**—The granting of a new trial is within the sound legal discretion of the Court, and its order will not be reversed unless a plain abuse of discretion is shown. Case stated where findings of fact and conclusions of law were, respectively, contrary to the evidence and findings of fact.—*Id.*
- The Court may order a new trial on condition that the party applying pay the costs taxed in the action.—*Corder vs. Morse*. 236
- TIME**—After the time within which a party must file and serve notice of motion for a new trial expires the Court has no power to grant an extension.—*Clark vs. Crane*. 412
- NOTICE OF MOTION**—If there is no notice of motion for a new trial there can be no settlement of a statement on such motion.—*Id.*
- It is error to grant a new trial as to one party in the absence of notice given to all the adverse parties.—*Whittenbrock vs. Belmer*. 760

- A party intending to move for a new trial must, within ten days after notice of the decision of the Court, file with the Clerk and serve upon the adverse party a notice of his intention to make the motion.—*San Fernando F. H. Asso. vs. Porter*..... 791
- DENIAL OF MOTION—Where the evidence sustains the findings, it is not error to deny a new trial.—*Blackford vs. Whistler*..... 785
- See EJECTMENT.
- NONSUIT—Where the allegations of the complaint are improved, not in particulars, but in their general scope and meaning, a nonsuit should be granted.—*Hackett vs. Bank of California*..... 270
- It is error to grant a nonsuit if plaintiff is entitled to nominal damages.—*Treadway vs. James*..... 786
- NOTARY'S CERTIFICATE—See WRITTEN INSTRUMENT.
- NOTICE—SUFFICIENCY OF—Notice of any fact calculated to put a prudent man upon inquiry, is, in the absence of explanation, sufficient to charge him with notice of all facts which an inquiry would have disclosed.—*Donald vs. Beals*..... 402
- ACTUAL NOTICE—If a party is present in Court, by his attorney, when a demurrer is overruled, and he asks and obtains leave to file an answer, written notice of the overruling of the demurrer is deemed waived.—*Baron vs. Deleval*..... 468
- See INSOLVENCY; NEW TRIAL; PUBLIC RECORDS; PROMISSORY NOTE; TENANTS IN COMMON.
- NUISANCE—See DAMAGES; POLICE POWERS.
- OFFICE AND OFFICER—OATH OF OFFICE—The failure to file the oath of office and the official bond within ten days after receiving notice of election creates a vacancy, which may be filled by the Board of Supervisors.—*People vs. Taylor*..... 480
- DUTIES—In the absence of a showing to the contrary, the presumption is that an officer has or will perform his official duty.—*Burke vs. Badlam*..... 572
- See JUDICIAL OFFICER; JUSTICE OF THE PEACE; POLICE JUDGE; SAN FRANCISCO.
- ORDER—See JUDGMENT.
- ORDINANCE—See CONSTITUTIONAL LAW.
- OUSTER—See EJECTMENT; TENANTS IN COMMON.
- PARTIES—See EQUITY.
- PARTITION—See DEED; JUDGMENT.
- PARTNERSHIP—In an action by one partner against the others, under a prayer for general relief, it is within the discretion of the Court to decree a dissolution of the partnership.—*Hall vs. Lonkey*..... 76
- DISSOLUTION—In decreeing a dissolution of the partnership it is within the power and discretion of the Court to further decree a sale of its property, and a sale of the debts due the partnership.—*Id.*
- LIABILITY—Where defendants denied that they "ever were or now are partners" without denying that they were doing business under the firm name, and it was found that they together purchased the property; their liability did not depend upon their being partners, and their denial that they "ever were or now are partners" did not raise a material issue.—*Hunter vs. Martin*..... 201
- A partnership is dissolved by the death of one of its members.—*Theller vs. Such*..... 513
- See ESTATES OF DECEASED PERSONS; FRAUD; TRUST AND TRUSTEES.
- PATENT FOR INVENTION—The interest of a party in letters patent for an invention may be sold on execution, and its assignment in writing may be enforced under the State laws.—*Pacific Bank vs. Robinson*..... 392
- RE-ISSUE OF PATENT—The intent of the law in permitting the re-issue of a patent is not to allow the patent to be enlarged, but only to allow the correction of mistakes inadvertently made, or the restriction of improper claims.—*Swain Turbine and Manuf. Co. vs. Ladd*..... 215

- A re-issue of a patent can only be granted for the same invention which was originally patented.—*Id.*
 See **STREET ASSESSMENTS.**
- PATENT TO LAND**—A patent not void on its face, issued by the State for land which it had a right to dispose of, is conclusive evidence of title in an action of ejectment as against a defendant who shows no connection with the common or paramount source of title.—*Kenfield vs. Hayes*..... 549
- ISSUED BY STATE**—That a patent had been issued by the State before the land had been certified over by the United States, affords no ground for setting it aside at the suit of the State.—*People ex rel. Hastings vs. Jackson*..... 706
- In such case the State cannot complain that the patent had been prematurely issued.—*Id.*
- WAGON ROAD GRANT**—A patent issued to land under a grant of Congress, to aid in the construction of a wagon road is conclusive evidence at law that the premises were included in the wagon road grant, and that the lands were not swamp lands.—*Cahn vs. Barnes*..... 202
- ISSUED TO ADMINISTRATOR**—A patent under an Act of Congress issued to a party in his individual capacity, he having petitioned the Board of Land Commissioners as administrator, is not void.—*Christy vs. Fisher*..... 598
- Sherman vs. McCarthy*..... 719
- A patent to a party as administrator vests the legal title in him.—*Sherman vs. McCarthy*..... 719
- Where such patent contains a stipulation that the interests of third parties should not be affected, the patentee becomes the trustee for the heirs of the deceased person of whose estate he is administrator, and his mortgagee is bound to take notice of the rights of such heirs.—*Sherman vs. McCarthy*..... 719
- LAND ON RESERVATION**—The land within a government reservation does not pass by patent to the Western Pacific Railroad Company.—*Carr vs. Quigley*..... 762
- WHEN VOID**—A patent issued by the office of the United States, which they have no authority to issue is void.—*Id.*
- See **STATUTE OF LIMITATIONS; WATER RIGHTS.**
- PLEADING**—In an action upon an undertaking to prevent the levy of an attachment, a complaint stating that the sheriff proceeded to levy on and attach personal property, and before the completion of the levy, defendants, for the purpose of preventing the levy, gave the undertaking which was duly accepted by the sheriff, but containing no averment that the levy was not completed, or that the sheriff proceeded no further therewith, was insufficient.—*Coburn vs. Pearson*..... 268
- AMOUNT IN CONTROVERSY**—A complaint showing that less than the jurisdictional sum is claimed, is subject to demurrer on the ground that the Court has no jurisdiction of the subject matter.—*Brodrick vs. Tibbetts*..... 435
- DEFECTS IN**—Defects in a pleading cannot be helped by the averments of any other pleading.—*Coulthurst vs. Coulthurst*..... 716
- ANSWER**—An amended answer supersedes the original.—*Kenfield vs. Hayes*..... 549
- See **COUNTER CLAIM; CONVERSIONS; DEMURRER PARTNERSHIP; PRACTICE; NONSUIT; RESCISSION OF CONTRACT; UNDERTAKINGS.**
- PLEDGE**—See **ESTATES OF DECEASED PERSONS; MORTGAGE.**
- POLICE JUDGE**—A police judge is a judicial officer of a municipality, and not one of the officers mentioned in Section 10, Article XXII of the Constitution.—*People vs. Henry*..... 743
- ELECTION OF**—The Police Judge of Sacramento city is to be elected at the time of the election of other judicial officers.—*People vs. Henry*..... 743
- The purpose of the Act of April, 1, 1864 (providing for the election of such officer), was, that the Police Judge should be elected at such time; and the present Constitution continuing in existence, Police Courts, and changing the time of holding the judicial elections, from the month of October to September, does not alter the effect and meaning of the Act of April 1, 1864, that the Police Judge of Sacramento

- city should be elected at the election for judicial officers.—*People vs. Henry*..... 743
- See CONSTITUTIONAL LAW; MORTGAGE.
- POLICE POWER**—The Board of Supervisors of San Francisco have, under the Act of March 25th, 1863, the power to direct the summary abatement of nuisances, in the exercise of the police power; and the delegation of such power is in very large and general terms conferred by the provisions of Section 1, Article XI of the present Constitution: "Any county, city, etc., may make and enforce within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws." The complaint against the petitioner charged that he "did willfully and unlawfully throw into and deposit upon certain lands at Channel and Fifth streets, in said city and county (San Francisco), a large quantity of broken ware, dirt, rubbish, garbage and filth; the said place where the same was thrown and deposited not being a place designated for that purpose by the Superintendent of Public Streets and Highways of said city and county:" Held, sufficient.—*Ex parte Cassinello*..... 577
- See SAN FRANCISCO.
- POWER OF ATTORNEY**—See FORECLOSURE.
- PRACTICE**—**STRIKING OUT**—Superfluous matter in a complaint may be removed by motion to strike out.—*Mora vs. Leroy*..... 633
- Where, in an action by an endorsee on a promissory note, defendant, by a verified answer, denies that there was any consideration for the note, and also denied that payee endorsed it to plaintiff or any other person for value, and also denied that plaintiff had ever paid anything for it, striking out such an answer as sham and irrelevant is an error, —*Greenbaum vs. Turrill*..... 193
- If defendant, in answer to a verified complaint, sets up matter which, if true, would constitute a good defense, and swears that he believes it to be true, he is entitled to have the issue tried by jury upon common law evidence, and such answer cannot be stricken out as sham on mere motion and affidavits.—*Greenbaum vs. Turrill*..... 193
- No pleading other than an unverified affirmative defense can be stricken out as sham.—*Greenbaum vs. Turrill*..... 193
- OBJECTION TO VERIFICATION**—An objection to the sufficiency of the verification to a pleading cannot be heard on demurrer.—*Seattle Coal & T. Co. vs. Thomas*..... 199
- ERROR**—In case of default in an action for goods sold and delivered, it is incumbent on appellant, if injured by the reading of an account to the jury, to show the incorrectness by bill of exceptions.—*Carrol vs. Storck*..... 267
- Where a bill rendered—a transcript from an account—was presented to Storck, who did not dispute its correctness, but only asked for time, testimony on direct examination that the goods were sold to Storck and on cross-examination, that they were not sold by witness to Storck in person, not only tended to prove a sale and delivery to Storck of the goods sold to Storck & Co., but created a substantial conflict in the evidence.—*Id.*
- EXAMINATION OF WITNESS**—Where a witness, not called, was not shown to be either out of the county, of unsound mind, or dead, nor was his appearance waived, the objection that he was not called and sworn is not well taken.—*Estate of McCarthy*..... 278
- AMENDED COMPLAINT**—A copy of an amended complaint, filed by leave of the Court, need not be served upon such defendants as have made default to the original complaint. (*Elder vs. Spinks*, 53 Cal. 293, distinguished.)—*McGary vs. Pedrona*..... 566
- A party who has been served with an amended complaint, filed by leave of the Court, cannot object that other defendants have not been served. Such objection must come from the defendants not served.—*Id.*
- Service of a copy of an amended complaint is waived by filing an answer thereto.—*Id.*
- STAY OF PROCEEDINGS**—Where defendant moved for a stay of proceedings on attachment because of insolvency proceedings commenced

- within two months after levy, the Court may grant the motion notwithstanding the assignee was not a party to the action and the motion had formerly been denied the defendant, and no leave had been obtained to renew it.—*Baum vs. Raphael*. 285
- ANSWER—The answer to a cross-complaint is deemed controverted.—*Colton Land and W. Co. vs. Raynor*. 589
- NEW MATTER—No replication is required under the Code, but the statement of new matter in the answer, in avoidance or constituting a defense, must be deemed controverted by the opposite party.—*Colton Land and Water Co. vs. Raynor*. 592
Colton Land and Water Co. vs. Raynor. 589
- CAPACITY TO SUE—The capacity of a plaintiff to sue cannot be tested by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, or that it is ambiguous, unintelligible and uncertain.—*Mora vs. Leroy*. 633
- SUBSTITUTION—By answering an amended complaint filed by a party who has been substituted for the original plaintiff, defendants will not be heard to object that there had been no regular substitution of plaintiff, or that they were not regularly made parties defendant.—*Mora vs. Leroy*. 633
- WHO CANNOT OBJECT—A defendant as to whom a demurrer has been properly sustained, is practically out of the case, and his objections to subsequent proceedings in the action cannot be considered.—*Ramsey vs. Flournoy*. 781
- PRE-EMPTION—See PUBLIC LAND.
- PRETERMITTENT CHILD—See HEIR; WILL.
- PRINCIPAL AND AGENT—To constitute a ratification the principal must be acquainted with that which has actually been done.—*Dean vs. Bassett*. 479
- A principal is not bound by the approval of an act already done, under a misapprehension of the real nature of the facts.—*Id.*
 See AGENCY.
- PRIORITY OF LIENS—Where a party had a mortgage anterior in date to a mechanic's lien, but not recorded till after the mechanic's lien accrued, the mortgage was the prior lien, unless the claimants under the mechanic's lien had no notice of the unrecorded mortgage.—*Root vs. Bryant*. 43
- PROBATE PROCEDURE—An averment in a petition for probate of a will that, at some time, deceased left a will in the possession of a party, is not an averment that deceased left such will at the time of his death.—*Estate of Kidder*. 273
- WILL—A will lost or destroyed after the death of testatrix must be alleged and proved to have been in existence at the time of her death; if lost or destroyed before her death, it must be alleged and proved that it was fraudulently destroyed during her lifetime.—*Estate of Kidder*. 273
- A contestant is not called upon to meet any case not made by the petition, hence findings on such matter will be disregarded.—*Id.*
 See ESTATES OF DECEASED PERSONS.
- PROMISSORY NOTES—PROTEST—A certificate of a notary attached to the protest of a note, that the parties to the note had been duly notified of the protest, is sufficient.—*Kellogg vs. Pacif. Box Co.*. 457
- CERTIFICATE OF NOTARY—A certificate stating that he notified, by letter to him, written, addressed, and dated on the day of the protest, and served it on him by delivering the letter at his place of business to a person of discretion, having charge thereof, is sufficient.—*Id.*
- NOTICE—HOW SERVED—A delivery of a notice by a notary at the place of business of a party to a person of discretion, obviates the necessity of sending it by mail.—*Id.*
- A party receiving notice of the protest of a note is sufficiently informed thereby of the note having been dishonored.—*Id.*
 See FRAUD; NOTICE; PRACTICE; RESCISSION OF CONTRACT; SHERIFF.
- PUBLIC CORPORATION—A Reclamation District is a public corporation.—*Hoke vs. Perdue*. 690

People ex. rel. Att'y-Gen. vs. Williams..... 120
See RECLAMATION DISTRICT.

- PUBLIC LANDS**—In a contest for the right to purchase certain public lands, the decision of the U. S. Land Department is conclusive unless it could be shown that there had been fraud or fraudulent imposition on the officers of the United States, which controlled their decision.—*Mace vs. Merrill*..... 72
Williamson vs. Merrill..... 68
- ACT TO QUIET LAND TITLES**—Where the Act of Congress of July 23, 1866, for quieting land titles in California, provided that applications to purchase under it should be filed within ninety days after the filing of the township map in the United States Land Office; and it appeared that the map had been filed and then withdrawn and afterwards refiled: Held, that when the map was withdrawn by proper authority it was as though it had never been filed, and that the day of its return to the files was, in contemplation of law, the date of its filing, from which the ninety days were to be counted.—*Id.*
- SCHOOL LAND WARRANTS**—Where a settler on public land located certain school land warrants, and another person claimed the same land under a State patent for swamp lands, and the Surveyor-General referred the contest to the proper Court, wherein there was a final judgment for the settler, the Surveyor-General could not resist recognizing him as the party entitled to the land.—*Langenour vs. Shanklin*... 140
Where a contest in relation to public lands was properly referred by the Surveyor-General to the proper Court, and final judgment was rendered, he could not call in question the evidence on which the Court rendered its judgment, or its rulings on matters of law.—*Id.*
- CONSTITUTIONAL PROVISIONS**—In relation to the granting of public lands only to actual settlers, the Constitution has no application to cases where rights to land attached prior to the adoption of the new Constitution.—*Id.*
- INTERVENTION**—Where a contest as to the right to purchase public land referred to the proper Court, was finally determined, and an application was made to compel the Surveyor-General to approve the application of the successful party, new parties could not be allowed to intervene and prevent enforcement of the judgment.—*Langenour vs. Shanklin*..... 140
- DUTY OF SURVEYOR-GENERAL**—It is the duty of the Surveyor-General to approve the application of the successful party in such a case as he may be compelled so to do by mandamus.—*Id.*
- RIGHTS OF PRE-EMPTIONER**—A pre-emptioner may settle, occupy and use public lands of the United States, and may clear away timber for purposes of cultivation and occupation, but until he perfects his title he can use it only in such manner as the Government authorizes.—*Ladd vs. Hawley*..... 9
- TITLE TO TIMBER**—The title to timber cut by a pre-emptioner on public land previously to perfecting his title does not pass to him, and he cannot recover on a contract to have it cut for milling purposes.—*Id.*
- RIGHT OF PRE-EMPTION**—The right of pre-emption can be exercised only on unsettled, unoccupied, public land.—*Polack vs. Gurnee*..... 419
- SIOUX HALF-BREED SCRIP**—Sioux half-breed scrip, when located by an attorney in fact, must be accompanied by a power of attorney in all cases, or the location is void.—*Id.*
It cannot be located on occupied public lands in any State or Territory, it can only be made on lands subject to pre-emption.—*Id.*
If located on land in the possession of a purchaser from the State of California—the same being covered by improvements—the location is void.—*Id.*
- GRANT TO STATE CONSTRUED**—The Act of Congress, granting to the States, respectively, 500,000 acres of land, operated as a grant in present of that quantity of land to be selected by the State.—*Id.*
A State selection of land, under a grant made by Congress to the State, after survey by the United States, is valid as a selection of surveyed lands.—*Id.*
- TITLE, WHEN VESTS**—When the State, under this Act and under the State

- laws, has once made a selection the title to such land vests in the State at once.—Id.
- VALIDITY OF LOCATION**—The validity of the certificate of location or patent is not dependent upon the publication of a notice of application by the locator to the Register of the land office.—*People ex rel. Hastings vs. Jackson*..... 706
- See CONTRACT; SAN FRANCISCO; TIMBER.**
- PUBLIC RECORDS**—It is the duty of a County Recorder to indorse upon an instrument for record the exact time it is received by him, noting the year, month, hour, and minute of its receipt; and to record the same without delay, in the order and as of the time when it is received for record, and the name of the person at whose request it is recorded.—*Donald vs. Beals*..... 402
- MORTGAGE**—A mortgage is deemed in law to be recorded at the moment of time it is deposited in the office of the Recorder, with the proper officer, for record.—*Donald vs. Beals*..... 402
- If there is a conflict between the record of a mortgage, as it appears in the record book, and the indorsement on the mortgage of the time it was deposited for record, the record book will prevail in favor of a subsequent bona fide purchaser.—Id.
- QUIETING LAND TITLES**—*See ACTIONS; CLOUD ON TITLES; EQUITY; MANDAMUS; NEGLIGENCE; PATENT TO LAND; PUBLIC LAND; RAILROAD CORPORATIONS; REAL ESTATE.*
- RECEIVERS—ORDER TO COLLECT RENT**—An order appointing a receiver to collect rents, issues, and profits during the pendency of action, from the co-tenants, with authority to devise and let said lands and premises, and to apply the rents collected to the payment of taxes, and and otherwise dispose of said rents and profits, confers no power on the receiver to compel persons in possession to take out leases and pay for the use and occupation, nor to take away the possession of such co-tenants.—*Emeric vs. Alvarado*..... 445
- APPOINTMENT OF**—The appointment of a receiver, pending litigation, does not oust a party of his right to the possession of the property or its benefits; the receiver merely holds possession for the benefit of the party ultimately adjudged entitled to the property.—*Coburn vs. Ames*..... 408
- See EQUITY.*
- RECLAMATION DISTRICT—FORMATION OF**—Where an action was brought by a Reclamation District to enforce an alleged assessment for reclamation purposes, made under and pursuant to the provisions of the Political Code (section 3448, et seq.); and it appeared that the district was not formed under the Code, or re-organized under it as provided in section 3478 thereof: Held, that the provisions of the Code had no application, and that the assessment based upon them was unauthorized and void.—*Reclamation District No. 3 vs. Kennedy*..... 89
- A Reclamation District is a public corporation.**—*Hoke vs. Perdue*..... 680
- People ex rel. Att'y-Gen. vs. Williams**..... 120
- A CORPORATION**—If a proper publication of the petition for forming the Reclamation District had been made, a corporation was formed, and an action upon an assessment for reclaiming swamp and overflowed lands, it being the real party in interest, the action could not be brought in the name of the people.—*People vs. Haggin*..... 281
- See CORPORATIONS; EQUITY; FORECLOSURE; INSOLVENCY; SWAMP AND OVERFLOWED LANDS.**
- RECORD**—*See DEED; PUBLIC RECORDS.*
- REFERENCE**—*See EQUITY.*
- REMOVAL OF CAUSE**—Upon the removal of a cause to a Circuit Court, the Circuit Court has power, before the first day of its next term, to allow or modify its injunction.—*City of Portland vs. Oregonian R. R. Co*..... 376
- INJUNCTION**—Where a suit for injunction turns wholly upon the validity of an Act of the Legislature granting the defendant the exclusive right to the use of certain property to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property in a way not materially

in conflict with any use to which it is being put is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly.—Id.

In the consideration of the matter, weight will be given to the presumption that an Act of the Legislature is valid, and that the defendant is engaged in a public enterprise in which the public is interested.—Id.

Upon the modification of an injunction, the Court may require as a condition that the defendant give a bond to secure the plaintiff against any injury which may result, or to perform the final decree concerning the same.—Id.

RESCISSION OF CONTRACT—Where a person purchased certain shares in homestead associations, gave his note payable in installments therefor, and left his shares with the vendor as collateral security; and, after paying a portion of the installments, discovered that he had been defrauded by false representations and refused to pay anything more; but for three years took no steps, either by notice or otherwise, to rescind the contract. In an action against him on the note, he could not avail himself of the defense of false representation for the reason that he had not taken any steps to rescind the contract within a reasonable time.—*Collins vs. Townsend*. 178

RIGHTS OF PARTIES DEFRAUDED—The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reasonable time to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim damages for the injury sustained by reason of the fraud.—Id.

Where a person desires to rescind a contract of sale of property on account of fraud, if the vendor has retained possession of the property sold as security or otherwise, the purchaser should indicate his intention to rescind and notify the seller that he abandons all right or claim to the property; and if he fails to do so, he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it.—Id.

DEFENSE TO ACTION—Misrepresentations made by the payee of a note, he knowing them to be untrue, for the purpose of inducing the payor to purchase mining stock of no value, the latter believing the representations to be true, in connection with an offer by the payee, within a reasonable time, to rescind the contract by tendering the stock and demanding his note, constitutes a perfect defense to an action upon the note.—*Bank of Woodland vs. Hiatt*. 691

A party has a right to rely upon representations as to facts not within his knowledge, and the person making the representations cannot escape responsibility by showing that the party to whom they were made might have ascertained that they were untrue.—Id.

RIGHT OF WAY—See **CLOUD ON TITLE**; **COVENANT**; **WATER RIGHTS**.

SALARY OF JUDGE—Where a Judge of a Superior Court at the end of a certain month failed to present to the Controller of State an affidavit that no case in his Court remained undecided that had been submitted for ninety days, but at the end of the next month he presented such an affidavit, and the Controller claimed that he was not entitled to any salary for the first month: Held, that presenting the affidavit he was entitled to his salary for both months.—*Meyers vs. Kenfield*. 80

AFFIDAVIT REQUIRED—Section 24 of Article IV of the Constitution in relation to the affidavit required of Judges, to the effect that no cases submitted remain undecided for ninety days, was intended merely to prohibit them from receiving their monthly salaries until all cases that had been submitted for ninety days were decided.—Id.

SALE AND DELIVERY—Where A having cattle, which ran at large with those of B, his tenant, in a pasture used by them both, made a sale to C, and in consummating it directed B to drive them into a corral, where A, B and C met; and A said to C, "Here are your cows that you bought," and C then requested B to take care of and pasture

them for her, and thereupon B, agreeing to do so, turned them back into the pasture; the delivery and change of possession were sufficient to protect the cattle from being afterwards seized as the property of A.—*Morgan vs. Miller*..... 189

See EQUITY.

SALE OF LIQUORS—See CONSTITUTIONAL LAW.

SAN FRANCISCO—FIXING PRICE OF GAS—Where the Board of Supervisors of San Francisco were authorized by statute to fix the price to be paid by the city and county for gas: Held, that it had no power to delegate its power to persons not members of the Board, or to alienate its power of final determination.—*San Francisco Gaslight Co. vs. Dunn*. 96

POWER OF SUPERVISORS—Where the Supervisors of San Francisco, being authorized to fix the price of gas to be furnished to the city and county, made a contract by which the fixing of the price was referred to a commission, and after the report of the commission the Board passed an order fixing the price in accordance with the report: Held, that the price was in effect fixed by the Supervisors.—*Id.*

CANNOT CEDE THEIR POWERS—A Board of Supervisors, having power to provide for lighting the streets of a city, has power to contract for such lighting; but it cannot make such a contract as will cede its powers or control or embarrass future legislation; and any contract, amounting to a cession of the right of future legislation, or evidently not intended to be authorized, will be invalid.—*Id.*

CONTRACT INVALID—Where an Act of April 13, 1876 (Stats. 1875-6, p. 854), prohibited the Supervisors of San Francisco from making any contract for any purpose for a longer period than two years binding upon the city: Held, that a contract purporting to be for five years was not valid for two years, but was altogether invalid.—*Id.*

AUTHORITY TO PAY FOR GAS—The Board of Supervisors of San Francisco was authorized to allow and order paid the bill of the San Francisco Gaslight Company for gas furnished for lighting the streets in October, 1879, not on account of any contract previously entered into, but under the general powers of the Board to pay what the gas was reasonably worth.—*Id.*

ALLOWANCE OF CLAIM BY—Where the Supervisors of San Francisco had the power to allow a claim, and did allow it, the fact that the claimant based his demand upon an invalid contract, nothing appearing as to the grounds upon which the Supervisors acted, did not render the allowance invalid; and the Auditor had no discretionary power to reject it.—*Id.*

CITY LANDS—Where, on a former adjudication, the Court had decreed that the Mayor should convey the city title directly to plaintiff, and defendants had never made any application for the land, paid any taxes or assessments on the property, or complied with any of the requirements of the city ordinance or statutes on the subject plaintiff was entitled to recover.—*Forbes vs. Reilly*..... 348

OUTSIDE LANDS—Where a case presented the same question as to the effect of an outside land deed in the City and County of San Francisco as that involved in *Dupont vs. Barstow*, 45 Cal. 446, the judgment, on the authority of that case, should be affirmed.—*McCue vs. Von Schmidt*..... 191

ACT RELATING TO ELECTIONS—The Act of March 7, 1881, amending the Political Code, (relating to elections), does not repeal the Act of April 2, 1866, as amended March 7, 1872, providing for the election of city and county officers in San Francisco.—*Per SHARPSTEIN, J.*—*Wood vs. Board of Election Commissioners*..... 642

CITY AND COUNTY—The present City and County of San Francisco is a continuation of the late municipal corporation known as the "City of San Francisco."—*Id.*

CITY CHARTER—If the provisions of a city charter conflict with the general law upon the same subject, the provisions of the charter govern.—*Id.*

ACT WHERE APPLIES—The Act of March 7, 1881, applies to municipal corporations whose charters contain no provision in conflict with it. The title of the Act of March 7, 1881, is repugnant, so far as relates

to elections, to the provision of the Constitution requiring that the subject of every Act shall be expressed in its title.—Id.

CONSOLIDATION ACT—The Consolidation Act of San Francisco is not affected by the provisions of the Political Code, and an amendment to such Code is to be treated, as far as concerns such Act, in the same light as if it formed a part of the Code at the time of its adoption.—Id.

MUNICIPAL CORPORATIONS—Municipal corporations organized before, as well as after, the adoption of the new Constitution, are controlled by general laws—laws relating to such corporations, or laws relating to subjects not provided for in the charters of such corporations. Section 7 of Article XI of the Constitution is prospective in its operation, and has reference to such city and county governments as may be merged into one municipal government after the Constitution had been adopted.—Id.

CHIEF OF POLICE—The office of Chief of Police is not elective.—Id.

POLICE JUDGES—The Police Judges are not to be elected at the same time as the city and county officers of San Francisco.—Id.

The Assessor is not to be elected this year.—Id.

CITY OFFICERS—With the exception of Police Judges, Chief of Police and Assessor, all the elective officers of the City and County of San Francisco are to be elected at the time fixed by the Acts of April 2, 1866, and March 30, 1872.—Id.

ELECTIONS—To postpone the election of officers of the City and County of San Francisco to 1882 would be to extend the terms of office of the present incumbents, and violate Section 9, Article XI of the Constitution. The Act of March 7, 1881, provides for a uniform system of elections for all elective county, city and county and township officers in the State, on the even-numbered years, commencing in the year 1882, and applies to San Francisco as well as to every part of the State; but it does not repeal the existing law requiring an election to be held in San Francisco this year. The effect of the Act of March 7, 1881, is to shorten the terms of officers elected this year. There is nothing in the Constitution forbidding the Legislature shortening the terms of municipal officers. The City and County of San Francisco is subject to general laws passed by the Legislature.—Id. Per ROSS, J.

The Act of March 7, 1881, so far as it may operate to extend terms of office, is in conflict with Section 9 of Article II of the Constitution.—Id. Per MCKINSTRY, J., AND THORNTON, J.

There should be an election of municipal officers for the City and County of San Francisco this year. Neither the Assessor nor Police Judges are to be elected this year.—Id. Per MORRISON, C. J.

All officers in municipal, must be elected on even-numbered years. The Consolidation Act of San Francisco is in conflict with the Constitution requiring elections on even-numbered years. The terms of officers throughout the State, in 1880, expired on the first Monday after the first day of January, 1881; and where there have been no elections since, the incumbents hold over until the election or appointment of their successors.—Id. Per MYRICK, J.

The Act of March 7, 1881, harmonizes with the Constitution, is a general law, and is now the law of the land. It includes the City and County of San Francisco, and the provisions of the Consolidation Act in conflict with it are repealed. There is no law providing for an election of municipal officers in the City and County of San Francisco prior to 1882. The present incumbents continue in office until their successors are elected and qualified; their terms of office are not extended within the meaning of the Constitution.—Id. Per MCKEE, J.

See **POLICE JUDGES**; **POLICE POWERS**; **STREET ASSESSMENTS**; **TITLE**; **VAN NESS ORDINANCE**; **WATER RIGHTS**.

SCHOOL LANDS—The grant of the sixteenth and thirty-sixth sections of the public lands to the State of California, was not intended to cover mineral lands, but such lands was excluded from that grant.—Wedgekind vs. Craig.....

See **STATE LANDS**; **PUBLIC LANDS**.

- SELF-DEFENSE**—On a plea of self-defense in justification of homicide, it need not necessarily appear that the person killed was the assailant and that the slayer had really and in good faith endeavored to decline any further struggle, as defendant may have been justified, even if he had been the assailant in the first altercation.—*People vs. Flahave*... 78
- A LAW OF NECESSITY**—The law of self-defense is a law of necessity—real or apparently real; and a party acting under it may act upon appearances, even though they turn out to be false. The jury, upon all circumstances, is to decide whether the appearances were real or apparently real.—*People vs. Flanagan*... 675
- BURDEN OF PROOF**—The burden of proof is upon the prosecution in a criminal case, and it is error to charge the jury, when the prosecution has made out a prima facie case, and evidence has been introduced tending to show a defense, that they must convict, unless they are satisfied of the truth of the defense. Such an instruction ignores the doctrine of reasonable doubt, which might be raised by the evidence in the case.—*Id.*
- See **HOMICIDE**; **INSTRUCTIONS**; **STATE LANDS**.
- SERVICE OF SUMMONS**—The affidavit of service of summons by a private person must state that he was over eighteen years of age at the time of the service.—*Maynard vs. McCrellish*... 181
- SHARES OF STOCK**—See **CORPORATIONS**; **EMBEZZLEMENT**; **ESTATES OF DECEASED PERSONS**; **TAXATION**.
- SHERIFF**—A Sheriff is not responsible to the surety upon a promissory note for a failure to levy an attachment in an action brought upon the note by the holder.—*Thompson vs. Miller*... 808
- SHERIFF'S DEED**—A deed executed by a person in his official capacity of Sheriff is valid though not signed by him as sheriff.—*Sherman vs. McCarthy*... 719
- SHORT-HAND REPORTERS**—Short-hand reporters are not entitled to fees for services rendered before a Justice of the Peace sitting as a committing magistrate.—*Fox vs. Lindley*... 580
- SIOUX HALF-BREED SCRIP**—See **PUBLIC LANDS**.
- SOFTENING OF THE BRAIN**—See **INSANITY**.
- SPECIFIC PERFORMANCE**—A Court of equity will not specifically enforce any contract unless it be complete and certain, nor will it enforce that which is only the base of an agreement.—*Los Angeles Immigration & L. Co-op. Ass'n vs. Phillips*... 25
- DAMAGES**—In an action for specific performance, if plaintiff has not been damaged, no damages will be allowed.—*Reese vs. Hoeckel*... 641
- See **CONTRACT**; **EQUITY**.
- SPRING VALLEY WATER WORKS**—See **CONSTITUTIONAL LAW**; **WATER RIGHTS**.
- STALE CLAIM**—The claim of the holder of a note secured by mortgage to to cancel a release of the mortgage executed without his consent, and without payment of his note, is not stale if asserted within the period allowed by law, and no rights of bona fide purchasers have intervened to render inequitable the assertion of his lien.—*Connecticut Genl. L. Ins. Co. vs. Eldredge*... 302
- See **EQUITY**; **MORTGAGE**.
- STATE FUNDS**—The general funds in the State Treasury consists of moneys received into the Treasury not specially appropriated by law.—*Camron vs. Weil*... 492
- GENERAL FUND**—The fact that moneys are collected for a certain fund, and paid into the Treasury under an invalid statute, is no reason why such moneys should be credited to the General Fund.—*Id.*
- STATE TREASURER**—The State Treasurer may refuse to pay out money received in his official capacity under an unconstitutional law.—*Id.*
- The intention of the Legislature to exclude moneys from the "General Fund" does not depend upon the validity of the Act by which such exclusion is manifested.—*Id.*
- MONEYS PAID UNDER VOID ACT**—Moneys collected and paid into the State

Treasury under a void Act must remain in the Treasury until appropriated to a certain purpose by the Legislature.—Id.

STATUTES—Statutes of a general nature do not repeal by implication charters and special Acts passed for the benefit of particular municipalities.—Wood vs. Board of Election Commissioners..... 642

STARE DECISIS—See SAN FRANCISCO.

STATE—See PATENT TO LAND; COSTS; SUIT; WATER RIGHTS; YOSEMITE GRANT.

STATE LANDS—The single fact that an application to the State for land had been rejected does not connect the applicant with the title of the State.—Kenfield vs. Hayes..... 549

After land has been listed to the State by the United States, the officers of the latter have no further control over the matter.—People ex rel. Hastings vs. Jackson..... 706

FORMER ADJUDICATION—In a former action of ejectment between the parties, the validity of a certificate of purchase issued by the State to the defendant in this action, was determined in his favor, as also the validity of a homestead application made by plaintiff herein, under the homestead law of the United States: Held, the question of the validity of the State certificate of purchase necessarily involved the validity of the selection of the land by the State, including its listing to the State by the United States, and that the judgment in that action was conclusive upon the parties in this action to quiet title, notwithstanding plaintiff herein had, since said judgment, obtained a patent from the United States based upon his homestead application.—Shinn vs. Young..... 74

ESTOPPEL—In 1871 the premises in controversy were selected and approved by the Land Department as a part of the wagon road grant, without objection on the part of the State or any attempt to show that they were swamp, and in 1872 the State sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money: Held, that the defendant has no title, and cannot prove title in the State under the swamp land grant, because the State is estopped to deny that the premises are within the wagon road grant.—Cahn vs. Barnes..... 202

Upon application for a writ of mandamus to compel the Surveyor-General of the State to issue a certificate for money paid for land claimed not to have belonged to the State, it appeared that the plaintiff's assignor had been sued and his interest in a certificate of purchase foreclosed, and a judgment rendered for costs: Held, that he and his assignees were estopped by the judgment from claiming that the State had no interest in the land; and that the money paid by him was properly applied to the satisfaction of the cost judgment.—Hartson vs. Shanklin..... 718

STATUTE OF LIMITATIONS—In an action to recover damages for suing out an execution upon a judgment which had been already satisfied, the Statute of Limitations commences to run at the date of issuance of the writ of execution.—Wood vs. Currey..... 239

MALICIOUS PROSECUTION—The Statute of Limitations for maliciously suing out an attachment, runs from the date of the levy.—Sharp vs. Miller. 259

DISABILITIES—To enable a party to defeat the plea of the Statute of Limitations he must show that at the time the action accrued he was not only under one of the disabilities mentioned in the statute but was at the time entitled to bring the action.—Crosby vs. Dowd..... 736

When a Statute of Limitations has begun to run, it will continue to run irrespective of any subsequent disability.—Id.

The clause in the Statute of Limitations which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued" does not imply the existence of a person legally competent to enforce it.—Id.

It runs in all cases not expressly excepted from its operation.—Id.

ISSUANCE OF PATENTS—It commences to run from the issuance of a patent for land from the United States.—Crosby vs. Dowd..... 766
Kenfield vs. Hayes..... 549

STAY OF PROCEEDINGS—See JUDICIAL OFFICERS; MANDAMUS; PRACTICE.
STIPULATION—See VERIFICATION.

STOCKHOLDERS—See CORPORATIONS; TRUST AND TRUSTEES; TAXATION.

STOCK OF CORPORATIONS—See CORPORATIONS; TAXATION.

STREET ASSESSMENTS—Where, in an action on a street assessment in San Francisco, on a complaint alleging certain of the defendants to be owners of the property, plaintiff on the trial was allowed to dismiss as to the owners; it is error to refuse a motion of the other defendants to have time to amend their answers, so as to show the parties so dismissed to be the owners, and therefore material and necessary parties defendant.—Harney vs. Applegate..... 85

DEMAND—The affidavit of demand under the statute, in street assessment cases, is sufficient evidence of such demand.—Dyer vs. Bregan 128
 Deady vs. Townsend 265
 Whiting vs. Townsend 291

A demand of payment of the assessment, or the premises, where the lot is assessed to unknown owners, is sufficient.—Whiting vs. Townsend. 291

PUBLICATION OF RESOLUTION—Where the street law required the resolution of intention to improve a street to be published for ten days, Sundays and non-judicial days excepted, and in a certain case it appeared that there was no publication on February 22d, which was within the ten days required for publication, and that day, being not a non-judicial day at the time, the publication was insufficient and the assessment invalid.—McVerry vs. Boyd..... 154

DESCRIPTION OF WORK—A resolution of intention that certain streets be planked and the angular corners thereof be reconstructed is a sufficient description of the work to be done.—Deady vs. Townsend..... 265

A resolution of intention describing the work, "Except that portion required by law to be kept in order by the railroad company having tracks thereon," is certain in its terms as to the work intended to be done.—Whiting vs. Townsend 291
 Following Whiting vs. City Grading Co. 325

The Board of Supervisors declared their intention that sidewalks on a street be reconstructed; one lot with a frontage of eighty-six feet nine and one-quarter inches was charged in the assessment for new sidewalks with only thirty-nine feet—there being nothing in the assessment or diagram indicating which particular thirty-nine feet was subject to assessment, and nothing indicating that said thirty-nine feet was separately assessed: Held, an insufficient description of the work contracted for and performed.—Gately vs. Bateman..... 364

INCIDENTAL EXPENSES—An objection that "incidental expenses" were improperly charged in an assessment cannot be raised for the first time in the Appellate Court.—Deady vs. Townsend..... 265

COMPLAINT—A complaint in a street assessment case containing the facts provided by the Act of April 1, 1872, relating to street improvements is valid.—Whiting vs. Townsend..... 291

IMPROVEMENT—Evidence that a lot assessed has not been increased in value by the improvement is not admissible.—Id.

LIABILITY OF LOT AS A WHOLE—The lot as a whole is liable for the entire assessment, and a specification of the particular interest of each owner is not required.—Id.

The Superintendent of Streets has no power to charge each separate lot with the work done in front of it.—Gately vs. Bateman..... 364

The Superintendent of Streets has no power to make separate assessments for old and new sidewalks; but the assessment must be to each lot for a share of the whole expense of reconstruction in the proportion its frontage bears to the whole.—Id.

PROPERTY BENEFITED—If sidewalks on a street between certain termini are ordered reconstructed, all the lots fronting on the street are to be treated as benefited in the proportion that each bears to the whole frontage.—Id.

VOID ASSESSMENT—A property owner is not bound to appeal to the Board of Supervisors to have a void assessment annulled.—Id.

ENFORCEMENT OF LIEN—A street assessment lien cannot be enforced

- against less than all of the property owners liable thereon.—*Tobelman vs. Roper*..... 560
- CONTRACT**—A contract to do street work cannot be varied, contradicted, or added to by parol testimony.—*Dunn vs. Altschul*..... 677
- PATENTED MATERIALS**—The Board of Supervisors have no power to enter into a contract for street work providing that patented materials shall be used in the work. The requirements of a contract for street work cannot be inferred from the use of the material in the performance of the contract: so Held, that if patented materials were used, it did not follow that the contract required that they should be used.—*Id.*
- STREET IMPROVEMENT IN OAKLAND**—A resolution of intention to improve a street in Oakland must be published five days, exclusive of Sunday. If the fifth day falls on Sunday the resolution must be published on the next day.—*Alameda Macadamizing Co. vs. Huff*..... 558
- AWARD OF CONTRACT**—An award of the contract on said last day is premature, as the City Council does not acquire jurisdiction before the full publication has been had.—*Id.*
- SUITS AGAINST STATE**—A State cannot be sued in her own territory either directly or indirectly, by setting up a counter-claim or set-off, except when permitted by express statute.—*People ex rel. State Prison Directors vs. Miles*..... 40
- SUMMARY PROCEEDINGS**—See COSTS.
- SUMMONS**—See SERVICE OF SUMMONS.
- SUPERIOR COURT**—The Superior Court of the City and County of San Francisco succeeded to the jurisdiction of the Fifteenth District Court of such city and county.—*Gurnee vs. Superior Court*..... 669
- See SALARY OF JUDGES; SAN FRANCISCO.
- SUPERVISORS**—See TURNPIKE COMPANIES; WATER RIGHTS.
- SUPREME COURT**—PRACTICE—Where a cause in the Supreme Court in bank was heard by but five of the justices, and four could not agree on the judgment, the submission should be vacated and the cause placed on the calendar for hearing.—*Knox vs. Supervisors of Los Angeles*..... 42
- Where the exclusion of evidence in the Court below was held improper in the Supreme Court, a motion by plaintiff in the Supreme Court for a judgment in his favor cannot be granted.—*Dyer vs. Brogan*..... 339
- See MANDAMUS; JURISDICTION; WRIT OF PROHIBITION.
- SURVEY**—See PUBLIC LANDS; STATE LANDS; SWAMP AND OVERFLOWED LANDS.
- SURVEYOR-GENERAL**—See PUBLIC LAND; STATE LAND.
- SWAMP AND OVERFLOWED LANDS**—Under the Swamp Land Act of 1870, a party claiming to be a preferred purchaser, must show that the land was "occupied for the purpose of tilling or grazing," and that, within ninety days after the filing of the fiat in the United States Land Office, showing the line of segregation, he has filed an application to have his possessory claim surveyed.—*Ramsey vs. Flourney*... 731
- SURVEY**—The failure to so apply for a survey in time is a waiver of any right he may have had as a preferred purchaser.—*Id.*
- CONTEST**—In case of a contest referred by the Surveyor-General to the Courts, the defendant must show in his answer that he is entitled to purchase in preference to plaintiff, a mere denial of plaintiff's right is insufficient.—*Ramsey vs. Flourney*..... 731
- LEEVE DISTRICTS**—Levee District No. 5, Sutter County, is a public corporation, and its corporate existence cannot be collaterally attacked.—*Hoke vs. Perdue*..... 680
- It is no objection to the repair of a levee that it had originally been constructed without the previous adoption of a plan for the protection of the district.—*Id.*
- The County Surveyor of the County of Sutter is ex-officio engineer of the levee districts within the county, and subject to the control of the Board of Supervisors.—*Id.*
- INJUNCTION**—The mere opinion of a party that a scheme of repairing levees is impracticable affords no reason in law for arresting the work by injunction.—*Id.*

- SWAMP LAND DISTRICTS**—Under the provisions of the Political Code relating to the formation of swamp land districts, etc., and providing for the case of a district situated partly in different counties, warrants must be presented to the Board of Supervisors of the several counties in which the land is, and each Board has the same discretion with respect to warrants drawn upon their county as has the Board where the whole district is included within the boundaries of one county.—*Cosner vs. Board of Supervisors*..... 739
 See **INJUNCTION** ; **PUBLIC LANDS**.
- TAXATION**—The franchise of a corporation is taxable property, and its valuation as determined by the Assessor cannot be revised by the courts.—*San Jose Gas Co. vs January*..... 510
- VALUATION**—The method of arriving at the valuation of taxable property is for the Assessor to determine. If he errs in his judgment the remedy is by application to the Board of Equalization for relief.—*Id.*
- INJUNCTION**—Injunction will not lie to restrain the collection of a tax, portion of which is legal, where plaintiff has not paid such portion.—*Id.*
- STREET MAINS**—In determining the value of street mains owned by a gas company, the Assessor estimated the cost of digging trenches, laying pipes, making connections, etc., and added the same to the estimated cash value of the mains: Held, proper, as the mains so laid in the ground for the purpose for which they were used were of more value than if they were not so laid.—*Id.*
- GAS FRANCHISE**—In estimating the value of plaintiff's franchise, the Assessor estimated the combined aggregate market value of the shares of the capital stock of the corporation owned by shareholders, and from that aggregate deducted the combined aggregate value of all the taxable property of the corporation, including real estate and improvements thereon, personal property, money, and street mains: Held, proper.—*Id.*
- DOUBLE TAXATION**—To assess a corporation for all of the property of every kind owned by it, including its franchise, and individual stockholders for the respective shares of stock held by them, is double taxation.—*Burke vs. Badlam*..... 572
- To assess to savings banks all of their property, including all moneys deposited with them by depositors, and also to the depositors the respective sums of money deposited by them, is double taxation.—*Id.*
- If all the corporate property of a corporation is assessed to it, and the tax thereon paid, it would be taxing the same property twice to impose a tax upon the stockholders for the proportionate amount of shares held by each, as the property rights of a stockholder are confined to the property held by the corporation.—*Id.*
- CORPORATION STOCK**—The stock of a corporation consists of its franchise and such other property as the corporation may own.—*Id.*
- When such franchise and other property is assessed, the stock is assessed. When the property of a corporation is assessed to it and the tax paid, the payment is by the stockholders.—*Id.*
- DUTY TO PAY TAX**—A party whose duty it is to pay a tax on real estate cannot strengthen his title by failing to pay and purchasing at the tax sale.—*Chisty vs. Fisher*..... 598
- TENANT IN COMMON**—A tenant in common has a right to assume that the possession of his co-tenant is his possession until informed to the contrary, either by express notice or by acts and declarations equivalent to notice.—*Aguirre vs. Alexander*..... 793
- A mere adverse holding and claim of the title by one tenant in common does not constitute an ouster of his co-tenant.—*Id.*
- See **EJECTMENT** ; **MORTGAGE** ; **RECEIVERS** ; **TRUST AND TRUSTEES**.
- TENDER**—Tender of a deed in pursuance of a contract to convey a perfect title is insufficient if there is a prior mortgage unsatisfied and undischarged.—*Hoeckel vs. Reese*..... 637
- See **DEED**.

THREATENING LETTERS—A threat made to induce appellant to dismiss an appeal is a threat made with intent to extort property from another.

—*People vs. Cadman*..... 93

To constitute the crime of sending a threatening letter with intent to extort money or other property, it is indispensably necessary for the letter so sent to be subscribed by the person sending it.—*Id.*

An information charging accused with having sent a letter threatening to expose to disgrace the person to whom sent, with intent to induce him to dismiss an appeal, though it appears that such letter was subscribed by another person, is sufficient.—*Id.*

TITLE—INTRUDER—A mere intruder into the possession of land acquires no property in the land as against the owner.—*Pancoast vs. Pancoast*... 271

Where the owner, in consideration of a release of a portion, executed a conveyance in fee for the remainder, the property so acquired by the intruder was under the conveyance.—*Id.*

If the intruder was unmarried at the time of the intrusion, but married at the date of the execution of the conveyance, the property so acquired is community property.—*Id.*

PRIOR MORTGAGE—Where a purchaser takes a deed, with information at the time that a prior mortgagee or trustee of a prior trust deed has released the property from the mortgage or trust without payment of the notes secured, or their surrender or express authority from the holder of such notes, such purchaser will take the property, subject to any equitable right of the holder of the notes, to secure the payment of which the prior mortgage or trust deed was executed.—*Connecticut Gen. L. Ins. Co. vs. Eldredge*..... 302

ACTS ENURE TO BENEFIT OF GRANTEE—In an action for money had and received, defendant perfected his title to a tract of outside lands in San Francisco, sold a portion of the tract to the city for a park, an award therefor was made to him and the amount paid: Held, that the acts of defendant in perfecting the title enured to the benefit of his grantees, he having disposed of portions of the tract before that time.—*Howard vs. Donohue*..... 332

The plaintiff, claiming under one of said grantees, could not recover in this action his proportion of the award without paying his proportion of the costs incurred by defendant in perfecting the title to the tract.—*Id.*

As defendant did not receive the portion of the award due the grantor of plaintiff, the latter could not recover in this action for money had and received.—*Id.*

BY POSSESSION—Possession which is not adverse is insufficient to put a party on inquiry.—*McNeill vs. Polk*..... 556

A party is not affected by a claim not hostile to the title which he is about to purchase.—*Id.*

See **CONTRACT; EJECTMENT; EQUITY; EXECUTORS AND ADMINISTRATORS; ESTOPPEL; FORECLOSURE; FRAUD; MORTGAGE; PUBLIC LANDS; TRUST AND TRUSTEES; YOSEMITE GRANT.**

TRIAL BY JURY—See **EQUITY.**

TRUST AND TRUSTEES—Defendant, in consideration of the conveyance of an incumbered estate, covenanted that he would pay off the indebtedness out of the estate, and if any money or land remained after payment of the indebtedness, he would convey part thereof to parties named in the covenant: Held, that a trust was created, and the beneficiaries named in the covenant acquired an estate in the land to the extent of one-fifth interest, contingent upon the sale of all the lands, and upon the sufficiency of the lands to pay the debts.—*Janes vs. Throckmorton*..... 242

TITLE—During the trusteeship, defendant, as the result of certain judicial proceedings and compromises, and by mortgaging the estate, acquired a conveyance to himself from lien holders, etc., to portions of the estate. The title thus acquired by him inured to the beneficiaries of the trust, in the proportion of one-fifth interest.—*Id.*

LAND CHANGED TO MONEY—To change the quality of land to money there must be a clear intention to that effect; otherwise the property retains

- its original character. A mere discretionary power of selling produces no such effect.—*Id.*
- PARTNERSHIP FUNDS**—Real estate purchased with partnership funds and on partnership account, the title being taken in the name of one of the partners, is partnership property, and the partner in whose name the title stands holds it in trust for his co-partners; and while such trust may be enforced against the administrator and heirs of the partner, it cannot as against a bona fide purchaser from the heir of such partner.—*McNeil vs. Polk*..... 556
- STOCKHOLDERS**—The property of a corporation is held by it in trust for the stockholders, who are the beneficial owners of it, in proportion to the amount of shares held by each.—*Burke vs. Badlam*..... 572
- TAXATION**—The Legislature has power to declare that property held in trust shall be assessed to the trustee. The ordinary relation of debtor and creditor does not exist between a savings bank and a depositor.—*Id.*
- SALE OF LANDS**—Where plaintiffs were trustees, and were authorized to sell to defendants certain lands under an agreement entered into between the parties that they were to sell the lands and fix the prices, defendants, if they wished to purchase specific tracts, must purchase according to the prices and subdivisions so fixed and made.—*Steinbach vs. Norwood*..... 583
- See **FRAUD**; **YOSEMITE GRANT**.
- TURNPIKE COMPANIES**—A turnpike corporation may extend its term of corporate existence under the Code.—*People vs. Pfister*..... 693
- It has a right to collect such tolls as the Board of Supervisors may authorize.—*Id.*
- UNDERTAKINGS—COMMON LAW BOND**—Though a bond given to procure release from attachment does not conform to the provisions of the statute, yet, if it conforms to the principles of the common law, a recovery may be had thereon, as upon a common law bond.—*Smith vs. Fargo*..... 122
- STATUTORY BOND**—Where a statute requires a bond to be executed in a particular form, no recovery can be had if it does not conform to it; but if the statute merely prescribes a form without making a prohibition of any other, a bond which varies from it may be good at common law.—*Id.*
- In an action against the sureties on a bond, copied in the complaint, the recitals in the bond were conclusive against defendants, and need not be specially averred or proved on the trial.—*Id.*
- See **ATTACHMENT**; **PLEADING**.
- UNLAWFUL DETAINER**—The demand for rent due, provided for in Section 1161 of the Code of Civil Procedure, must specify a time for compliance.—*Keane vs. Gin Gon*..... 163
- Two separate and independent judgments, the one against the tenant for forfeiture of lease and for damages, and the other against the sub-tenants for restitution of the premises, cannot be rendered.—*Iburg vs. Fitch*..... 329
- VAN NESS ORDINANCE**—Putting a fence of posts and two boards nailed on them on three sides of a tract of land, leaving the fourth open and without any natural barrier to keep cattle in, and turning a pair of oxen on the land on several occasions for a few days at a time, does not constitute an "actual possession" within the meaning of the Van Ness Ordinance.—*Davis vs. Spring Valley Water Works Co.*... 1
- See **SAN FRANCISCO**.
- VERDICT**—A juror will not be allowed to impeach his own verdict.—*Clark vs. His Creditors*..... 546
- Bad spelling will not vitiate a verdict.—*People vs. Sepulveda*..... 688
- A special verdict controls where the general verdict is inconsistent therewith, and it is error to give judgment in accordance with such a general verdict.—*Aguirre vs. Alexander*..... 793
- See **FINDINGS**.

- VERIFICATION**—A stipulation waiving verification of an answer is not a waiver of the effect of the verification of the complaint, and if such answer does not contain any specific denial it is insufficient.—*Harney vs. Porter*..... 118
- A verification that affiant has read the petition and knows its contents, "and that the same is true of his own knowledge and belief," is not defective on account of the words "and belief."—*Seattle Coal and T. Co vs. Thomas*..... 199
- See **PLEADINGS**; **PRACTICE**; **INSOLVENCY**.
- VESSELS**—**LIABILITY OF OWNERS**—Where a vessel owned in California and employed in carrying freight between San Francisco and San Diego, while in her regular trips was lost with all her freight and cargo, without the privity or knowledge of the owner, the owner's liability only extends to his interest in the vessel and freight then pending, and not for the value of the goods lost.—*Lord vs. Goodall & Co. S. S. Co.* 210
- See **COMMERCE**.
- VESTED RIGHTS**—See **WATER RIGHTS**.
- VIOLATION OF SEPULTURE**—**VIOLATION OF SEPULTURE**—The Act of April 1, 1878, p. 1050, does not repeal Section 290 of the Penal Code, but provides for a different offense. Both are to be read together.—*People vs. Dalton*..... 757
- MISDEMEANOR**—The use of vulgar, profane or indecent language anywhere within the presence or hearing of children, in a loud, boisterous manner, is a misdemeanor.—*Ex parte Foley*..... 61
- COMPLAINT**—If a complaint against the use of vulgar language omits to recite the language used is not on that account void, objection for such omission should be specifically taken.—*Ex parte Foley*..... 61
- The complaint that defendant "did use vulgar and indecent language within hearing of children" in a loud and boisterous manner, willfully and unlawfully, is sufficient under Section 415 of the Penal Code, without stating "on the public street of an incorporated town."—*Ex parte Foley*..... 61
- A complaint for misdemeanor which distinctly charges an offense in the words of the statute is sufficient.—*Id.*
- WAGON ROAD**—See **PATENT TO LAND**.
- WAIVER**—See **VERIFICATION**.
- WATER RIGHTS**—**UNDER PATENT**—Plaintiff obtained a patent from the United States for land after defendant's grantors had taken the necessary steps to appropriate, and were in the active prosecution of work necessary to appropriate, for mining, agricultural and other purposes, water flowing through the land covered by plaintiff's patent. On completion of the work, the right of defendant's grantors related back to the commencement thereof; that they acquired a vested right to the water prior to the issuance of plaintiff's patent, and, under the Act of Congress of July 23, 1866, granting the right of way to ditch and canal owners over the public lands, plaintiff could not restrain the defendant from diverting the water.—*Osgood vs. El Dorado W. D. Co.*..... 471
- There is no authority conferred by statute upon private corporations to condemn water that rises or flows in its natural course on the land of a private individual for the purpose of supplying a town.—*St. Helena Water Co. vs. Forbes*..... 776
- WATER RATES TO BE FIXED BY SUPERVISORS**—The Constitution of 1849 reserved to the State the power of altering or repealing laws in reference to corporations. Such law entered into the contract between the State and the petitioner, and became a part of it. Such power of alteration or amendment, however, must be reasonably exercised. The vested rights of corporations in such cases are as sacred as those of others. But the Act changing the mode of fixing the rates to be charged by the petitioner did not impair any vested right of property acquired under the Act of 1858. The privilege given to petitioner by the Act of 1858, of participating in the selection of Commissioners to fix the rates to be charged for water, was subordinate to the power

reserved by the State for regulating the subject, and the privilege of petitioner was subject to any laws which might subsequently be passed by the State in the exercise of its power of regulation. Being a governmental power, the Legislature could not grant it away. Changing the agents by which a thing is to be done, which a corporation is entitled to have done, does not interfere with the enjoyment of the right to have the thing done. The privilege of participating in the selection of agents to fix the rate formed no part of the contract between the State and the petitioner: Held, accordingly, that when the State, by the constitutional amendment of 1879, and the Act of 1881, in pursuance thereof, took away from the petitioner the privilege of participating in the selection of public agents to perform the duty, under its charter, of fixing water rates, it did not interfere with any of the vested rights of petitioner; and the exercise of its power in that respect cannot be regarded as an unconstitutional act, within the prohibition of the Constitution of the United States.—*Spring Valley W. Co. vs. Board of Supervisors*. 614

See CONSTITUTIONAL LAW; DEED; MANDAMUS; SAN FRANCISCO.

WILL—CAPACITY TO MAKE—It cannot be said as a rule of law that because a man is a drunkard he is of unsound mind, so as to be incapacitated from making a will.—*Johnson vs. Rice*. 104

Whether his inebriety has had the effect of rendering him incapable, either permanently or temporarily, covering the time of making the will, is a question of fact for the jury.—*Id.*

Where it appeared that the testator had been by the Probate Court adjudged incompetent and placed under guardianship, and it was claimed that such adjudication was conclusive on the point that he was incapable of making a will: Held, under Section 40 of the Civil Code, that the adjudication was, as to lack of testamentary capacity, only prima facie evidence, and that the Court below was correct in hearing evidence as to his restoration to capacity at the time the will was made.—*Id.*

SUFFICIENT EXECUTION—Where a question arose as to whether a witness to a will knew, when he became a witness, that it was to a will, and it appeared that the first he knew of it was that the testator came to his place of business and asked him to go and witness his signature, without saying anything about a will; that they then went to the scrivener who had drawn the paper; that testator then and there signed it, and asked the witnesses to witness it; that they thereupon signed as witnesses, the other witnesses knowing it to be a will; that the scrivener then asked the testator if the paper was his will, and he answered "yes;" and that the whole time occupied in the transaction at the office of the scrivener did not exceed five minutes: Held, that the whole interview between testator, scrivener and witnesses was one transaction; that as part thereof the testator declared to the witnesses that the paper was his will, and that the execution, in respect to being before witnesses, was sufficient.—*Id.*

EFFECT OF MARRIAGE—A subsequent marriage operates as a revocation of a precedent will.—*Morgan vs. Ireland*. 260

CHARITABLENESS—Property may be devised or bequeathed in trust for charitable uses, where the testator leaves legal heirs, only to the extent of one-third of his estate—the word "estate" meaning the gross estate of testator.—*Estate of Hinckley*. 381

PRETERMITTENT CHILD—If a will does not disclose an intentional omission of a pretermittent child it is entitled to share in the estate of its mother.—*Estate of Wardell*. 431

"Child" includes all children upon whom has been conferred capacity of inheritance.—*Id.*

TESTIMONY—A witness to a will who had no recollection of the circumstances attending its execution, but who recognized the signatures, may be properly asked if, taking into consideration his recognition of the signatures, it was his belief that the paper was signed and executed as a will.—*Estate of Gharky*. 561

PRIOR WILL—The execution of a prior will has no bearing upon the question of the execution of a subsequent will, if the testator, at the time

- of the execution of such subsequent will, is of sound and disposing mind.—Id.
- See CHARITABLE USES; EQUITY; ESTATES OF DECEASED PERSONS; HEIR; PROBATE PROCEDURE.
- WRIT OF PROHIBITION**—The office of the writ of prohibition is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction.—*Kentfield vs. Weil*..... 490
- The Legislature has no power to extend the operation of the writ of prohibition to boards or officers exercising ministerial functions.—Id.
- The writ of prohibition will not be issued to a ministerial officer.—*Le Conte vs. Town of Berkeley*..... 585
- Prohibition will not issue to restrain the lower Court from proceeding in the trial of a cause, pending the determination of an appeal from an order refusing to dissolve a temporary injunction issued in the action.—*Bliss vs. Superior Court*..... 704
- See INJUNCTION; MANDAMUS.
- WRIT OF RESTITUTION**—See CONTEMPT; UNLAWFUL DETAINER.
- WRITTEN INSTRUMENTS**—The construction of written instruments is a matter of law for the Court, and not of fact for the jury, unless when the meaning and construction are doubtful, and depend on extrinsic evidences.—*Aguirre vs. Alexander*..... 793
- Where a person executed two instruments, one in the name "Perre," the other on the name of "Perez," and there was evidence that both names represented one and the same person, the identity of the names being established, the instruments were held to be executed by the same person.—*Sherman vs. McCarthy*..... 719
- See DEED; MARRIED WOMAN; MORTGAGE.
- YOSEMITE GRANT**—YOSEMITE VALLEY GRANT AND MARIPOSA BIG TREE GROVE—The State of California holds the Yosemite Valley and Mariposa Big Tree Grove in trust, subject to the condition of the Government Grant.—*Ashburner vs. People*..... 396
- The management of the property was entrusted to the Governor of the State and eight commissioners, to be appointed by the Executive, and the State cannot commit the management to any other board, nor control the Executive in making the appointments, but it may set a reasonable limitation on the time a commissioner shall hold his office.—Id.

ERRATA TO VOL. VII.

- At page 704—Prohibition will not "live," read *lie*.
- At page 22, first syllabus, for "suit" of execution read *writ*.
- At page 111, fourth line of syllabus, for "award" read *answer*.
- At page 233, fourth line of syllabus, for "accepted" read *excepted*.
- At page 270, first line of second syllabus, for "improved" read *unimproved*.
- At pages 357–362 (noted).

